Supreme Court U.S.
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IN THE

Supreme Court of the United States

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976 (the "FSIA") provides among other things that a judgment-creditor of a foreign state or its instrumentality can execute only on the sovereign-debtor's property located "in the United States," 28 U.S.C. §§ 1609, 1610(a), 1610(b). This case presents the following questions related to this important limitation:

1. Is a fee payable by a foreign state to its wholly owned instrumentality considered to be "property in the United States," and therefore subject to execution under the FSIA to satisfy a U.S. judgment against the instrumentality, when the obligation (a) arises only in the future, (b) arises as a matter of the law of the foreign state, (c) is payable entirely within such state, and when the state has not waived its immunity from suit and execution or engaged in any conduct that would eliminate such immunity?

2. Whether the Second Circuit erred, in conflict with the Fifth Circuit and lower courts elsewhere, in resolving this question in contravention of the FSIA's statutory limitation that property belonging to a sovereign instrumentality be "in the United States" before it may be subjected to execution?

PARTIES TO THE PROCEEDING

The parties to the proceedings are listed in the caption of the decision of the U.S. Court of Appeals for the Second Circuit. Pet. App. 1a.

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner Perusahaan Pertambangan Minyak Dan Gas Bumi Negara states that it is an Indonesian oil and gas enterprise, wholly owned by (but a separate juridical entity from) the Government of the Republic of Indonesia.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") respectfully petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reported at *Karaha Bodas Co. L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70 (2d Cir. 2002), and appears in the Appendix of this Petition ("Pet. App.") at 1a-34a. The orders of the court of appeals denying timely petitions for rehearing are unreported, and appear at Pet. App. 41a-42a, 43a-44a. The judgment and mandate of the court of appeals

appears at Pet. App. 45a-46a. The order of the United States District Court for the Southern District of New York is unreported and appears at Pet. App. 35a-40a.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its decision affirming the district court's denial in part and grant in part of orders to show cause for writs of execution on December 10, 2002. Pertamina and non-party with interest Ministry of Finance of the Republic of Indonesia (the "Ministry") each submitted timely petitions for rehearing pursuant to Fed. R. App. P. 40 on December 24, 2002. The petitions for rehearing were denied by orders of the court of appeals entered January 13, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act of 1976, as amended ("FSIA"), provides in pertinent part:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, the property ***in the United States*** of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1609 (emphasis added).

> [A]ny property ***in the United States*** of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if [the instrumentality waived sovereign immunity or otherwise is not entitled to sovereign immunity.]

28 U.S.C. § 1610(b) (emphasis added).

STATEMENT OF THE CASE

This case concerns efforts to garnish the Republic of Indonesia's property—revenues from the sale of its natural gas—in satisfaction of a judgment against Pertamina—a juridically separate instrumentality of the Republic. Although the decision below correctly denied these efforts in most respects, it allowed the garnishment of a portion of those funds equal to a separate fee Pertamina eventually receives from the Indonesian Government, in Indonesia. The latter ruling was erroneous, as Pertamina's future right to a fee in Indonesia is not "property in the United States" as the FSIA requires.

The Court should review this case to explain and to apply the "in the United States" limitation of the FSIA. Doing so would allow the Court to clarify how this important situs limitation applies to debts, bank accounts, and other common forms of intangible property such as those at issue here—a recurring issue under the FSIA which the lower courts have not addressed in a consistent manner. This issue particularly warrants clarification because Congress has noted "the importance of developing a uniform body of law [under the FSIA]," H.R. Rep. No. 94-1487 at 32, *reprinted at* 1976 U.S.C.C.A.N. 6604, 6631. Such uniformity is important not only because of "the potential sensitivity of actions against foreign states," *id.*, but to preserve United States money center banks as a locus of global financial activity, which depends on careful delineation of separate ownership interests and, as to sovereigns, faithful recognition of the separation between governments and their agencies and instrumentalities. *See id.* at 28, 29-30, *reprinted in* 1976 U.S.C.C.A.N. at 6627-30.

This case also warrants review by the Court because of the significant questions of international comity and foreign affairs it implicates. The funds on which the Second Circuit decision would permit execution are owned by the Republic

of Indonesia—which has no liability for the judgment and has not waived its sovereign immunity—and constitute a principal source of that nation's foreign exchange. Allowing execution on these revenues would hinder the Republic's ability to meet sovereign debt repayment obligations and economic reform commitments imposed by the International Monetary Fund ("IMF"), or to achieve other domestic and international goals important not just to Indonesia but to others as well, including the United States, at a time when our Nation's relations with this important country are at a significant juncture.

The Underlying Judgment

On February 22, 2002, the U.S. District Court for the Southern District of New York granted on an *ex parte* basis motions seeking permission under 28 U.S.C. § 1610(c) to serve restraining notices on 15 bank garnishees and orders to show cause for writs of execution on Pertamina funds allegedly held by them. *Karaha Bodas Co.*, 313 F.3d at 77-78, Pet. App. 7a. Pursuant to those notices, nearly a half a billion dollars have been restrained in accounts in New York, notwithstanding that both the district court and the court of appeals have held that a substantial portion of those funds belongs to the Government of Indonesia and are immune from execution.

The process issued in New York arose as a result of the registration there of a judgment issued by the U.S. District Court for the Southern District of Texas. The Texas judgment, in the amount of $261 million plus interest of 4% per year from January 1, 2001, granted recognition to a foreign arbitration award obtained against Pertamina with respect to contracts entered into with a Cayman Islands company (Respondent here) that called for performance in Indonesia and that were governed by Indonesian law. The Texas court exercised jurisdiction pursuant to Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201 ff., implementing the

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), and consistent with the FSIA, 28 U.S.C. §§ 1330 and 1605(a)(6). The Texas judgment is on appeal to the Fifth Circuit without a supersedeas bond (which would have been impracticable). The Texas court had denied a stay of enforcement pending appeal and authorized registration of the judgment in New York pursuant to 28 U.S.C. §§ 1610(c) and 1963. *See* 313 F.3d at 75-77, Pet. App. 2a-6a.

The only New York garnishees holding funds even arguably relating to Pertamina were Bank of America and Bank of New York. 313 F.3d at 78, Pet. App. 7a; Pet. App. 36a-40a. Specifically, portions of funds held in various trust accounts administered by these banks are listed under Pertamina's name.

Pertamina sought discharge of the writ of execution on the ground that the restrained funds belong to the Government of Indonesia itself, and not to Pertamina. The Ministry as a non-party with interest also sought to quash the restraint, asserting the Government's property rights in the funds sought to be garnished. The district court ultimately ruled on the ownership of funds in 15 specific trust accounts at Bank of America, which contained the majority of the funds then under restraint.[1] Pet. App. 37a-39a; 313 F.3d at 79-80, Pet. App. 10a-11a.

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[1] The district court reserved decision as to the remaining trusts, as to which the court found the record to be incomplete, while certifying its order allowing attachment of funds in the 15 trusts for interlocutory appeal under 28 U.S.C. § 1292(b). Pet. App. 39a-40a. An order allowing execution as to specifically identified property is final and appealable under the collateral order doctrine. *See, e.g., Giove v. Stanko*, 49 F.3d 1338, 1341-42 (8th Cir. 1995). In the event, the Second Circuit accepted jurisdiction under Section 1292(b) and did not consider its jurisdiction under the collateral order doctrine. 313 F.3d at 80-81, Pet. App. 11a-13a.

The Funds At Issue

The 15 trust accounts at issue contain revenues from the sale of Indonesian liquefied natural gas ("LNG") extracted, produced, and sold pursuant to arrangements known as Production Sharing Contracts ("PSCs"). Pertamina has entered into PSCs—on behalf of the Indonesian Government—with various private contractors, who are generally responsible for exploration and production efforts. PSCs are governed by Indonesian law and are performed in Indonesia. The purchasers of LNG—none of which are in the United States or are U.S. entities—make payment to Bank of America as trustee, which pays debt service and various other production expenses, and distributes the remainder to the PSC contractors in specified amounts known as "Production Sharing Percentages." 313 F.3d at 78-79, Pet. App. 7a-9a.

Pertamina is denominated on Bank of America's books as receiving a Production Sharing Percentage. 313 F.3d at 79, Pet. App. 9a; Pet. App. 37a-38a. However, as the district court and court of appeals correctly found, that Production Sharing Percentage does not actually belong to Pertamina as a matter of governing Indonesian law. 313 F.3d at 90-92, Pet. App. 30a-33a; Pet. App. 38a-39a. Rather, Pertamina administers the PSC arrangements and the LNG export program on behalf of the true owner and beneficiary of the resources, the Indonesian Government. 313 F.3d at 78-79, 88-92, Pet. App. 7a-10a, 26a-33a.[2] The court of appeals likened Pertamina's role vis-à-vis the restrained funds to that

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[2] Pursuant to Indonesian legislation adopted on November 23, 2001, Law No. 22 of 2001, these responsibilities have been shifted to a Government agency separate from Pertamina, referred to in the legislation as the Implementing Body and now known as BP Migas. When the provisions of this new law are fully effective, Pertamina will have no right to the fee that is the subject of this Petition, but that does not affect the disposition of the funds currently restrained in New York. *See* 313 F.2d at 75-76, Pet. App. 3a.

of a "trustee," which does not itself have an "ownership interest" capable of being attached by a creditor. 313 F.3d at 92, Pet. App. 33a-34a; *see* 313 F.3d at 85-87, Pet. App. 21a-25a.

This principle reflects long-standing Indonesian law, under which the Government holds the nation's oil and natural gas for the benefit of the Indonesian people, as it does the revenues from the disposition of these resources.

> "The earth and the waters and the natural riches contained therein are the fundamentals of the people's prosperity. Therefore they should be controlled by the State and be made use of for the greatest possible prosperity of the people." Elucidation of the Indonesian Const., Art 33. Other Indonesian laws evince similar concerns. *See* Law Substituting Gov't Regulation No. 44 Year 1960; Law of the Republic of Indonesia Number 8 Year 1971.

313 F.3d at 87, Pet. App. 24a-25a. *See also* Elucidation to Law No. 44 of 1960 ("The State Enterprises in implementing their mining authority cannot be said to carry out mining operations as owner of the relative mining areas . . . . ***Only such compensations for services rendered*** in the form of exploration and/or exploitation and/or refining and processing or sale operations become property of the State Enterprises.") (emphasis added).

The district court's and court of appeals' rulings focused particularly on Indonesia's Government Regulation No. 41 of 1982. Article 5(2) of that regulation provides that the amount "received by Pertamina according to each Production Sharing Contract"—other than what it receives from the Government as a fee for its services rendered to the Government—"***shall be the Government's portion.***" 313 F.3d at 84, Pet. App. 18a; Pet. App. 38a-39a (Government Regulation No. 41) (emphasis added). The lower courts found that this provision gives the Government a ***property right*** in the specific funds

restrained here. 313 F.3d at 90-92, Pet. App. 30a-32a; Pet. App. 39a. On this basis, the courts rejected the judgment creditor's efforts to attach the "Pertamina" Production Sharing Percentage.

The Court of Appeals' Erroneous Ruling As To The "Retention Fee"

The district court and court of appeals permitted execution against an amount equal to the fee Pertamina eventually receives from the Indonesian Government for its administrative services, which Government Regulation No. 41 of 1982 denominates the "Retention Fee," 313 F.3d at 80, 84, 92, Pet. App. 11a, 18a, 34a. However, Pertamina has no enforceable right ***in New York*** as against the Government to that fee or to any portion of the funds in the 15 accounts.

Pertamina demonstrated to the courts below, without contradiction, that the same Indonesian laws and regulations that create Pertamina's right to a Retention Fee also provide that any such right arises only ***in Indonesia***. Pertamina as a matter of Indonesian law receives the fee in a separate transaction in Indonesia, after the entire Production Sharing Percentage denominated in its name is transmitted to the Government's account in Indonesia. Pertamina has no rights to the specific funds located in New York, which must be transmitted to the Government's account in full. *See* 313 F.3d at 89, Pet. App. 28a.

Indeed, dating back to at least 1967, Pertamina and its predecessors have been required to remit ***all*** proceeds to the State before they could be paid their fees as to Contracts of Work (the predecessors to the PSCs here). *See* Joint Decree No. 02/KB/M/Pertamb/1967, Articles 1-2 (making clear "***that the whole income amount*** resulting from Work Contract [must be] ***received by the State.***") (emphasis added). Only "afterwards" are such things as fees to be paid, "treated as expenses based on general Government policy." *Id.* (General Clarification to Joint Decree).

The requirement to pay all funds to the Government was given greater urgency in 1974, when, as a result of a severe financial crisis, Pertamina failed to do so. To insure against such lapses in the future, Presidential Instruction No. 12 of 1975 was issued, which expressly stated that all such revenues would be paid directly to the Ministry's account at Bank Indonesia (Indonesia's central bank). *See* Declaration of Sudargo Gautama ¶¶ 29-31 (March 20, 2002) (cited at 313 F.3d at 87, Pet. App. 24a, as "describing the regulation of PSC revenues").

To implement this instruction—and pursuant to the authority of Article 33 of Pertamina's then organic statute, Law No. 8 of 1971—the Ministry established specific procedures whereby the full amount of the "Pertamina" share under the PSCs must be remitted to the Ministry's account at Bank Indonesia, before any fee owed to Pertamina is calculated and paid by the Bank. The Minister's written instruction of 1976 states this clearly: "the rights of Pertamina will be disbursed from the foreign exchange account of the Department of Finance ***after*** the results of Pertamina exports [through] production sharing contracts and the deposits by the contactors ***have entered the foreign exchange account of the Department of Finance***." Minister of Finance Directive B-752/MK/IV/12/1976 (Dec. 16, 1976) (emphasis added). The Minister issued a comparable written instruction in 1984, this time to implement Regulation No. 41 of 1982. Once again, the instruction clarifies that Pertamina's Retention Fee is payable only from the Ministry's foreign exchange account in Jakarta and that, once the funds are received in that account, Bank Indonesia is to pay Pertamina an amount equal to "5/65 of LNG/Gas revenues from Production Sharing Contract respectively from every revenue of Pertamina export proceeds and payments from Contractors in the framework of Production Sharing Contracts." Minister of Finance Directive S-384/MK.012/1984. *See* 313 F.3d at 89, Pet. App. 28a ("undisputed evidence that [Pertamina] has

consistently transferred all of its Production Sharing Percentage to the Republic of Indonesia's account") (citing Declaration of Sahala L. Gaol).

Thus, Bank Indonesia calculates and initiates payment of Pertamina's fee after the Bank has confirmed receipt of the entire Production Sharing Percentage in the Ministry's account. Declaration of Sahala L. Gaol ¶ 9 (March 22, 2002). This separate transaction is effected entirely within the walls of Bank Indonesia in Jakarta. *Id.*; *see* Supplemental Declaration of Sahala L. Gaol ¶ 4 (April 4, 2002). Pertamina does not and has no right to withhold its Retention Fee from the "Pertamina" share distributed by Bank of America. *See* 313 F.3d at 89, 91-92 & n.19, Pet. App. 27a-28a, 32a-33a. Nor, because money is fungible, does Pertamina's fee necessarily come out of the particular funds that flow through the New York trust accounts.

The court of appeals did not deny these principles of Indonesian law, and indeed acknowledged that Pertamina "may be under an obligation" to transfer the restrained funds in their entirety to the Government. 313 F.3d at 92, Pet. App. 34a. Nevertheless, the court permitted execution on the Retention Fee, as did the district court, with an exceedingly brief analysis, the predicate for which was N.Y. C.P.L.R. § 5201(b). *See* 313 F.3d at 83, 92, Pet. App. 17a, 34a. The court of appeals held that the Retention Fee is "property within Pertamina's control" and therefore subject to execution, without ever discussing the "in the United States" limitation of the FSIA extensively briefed by the parties. 313 F.3d at 92, Pet. App. 34a. Both Pertamina and the Ministry petitioned the panel for rehearing based on this situs issue, but those petitions were denied without comment. Pet. App. 41a-44a.

The district court had stayed its own decision, and deferred ruling on other trusts, pending the appeal to the Second Circuit. Pet. App. 40a. The Second Circuit modified the stay

during the pendency of the appeal, ordering the release of funds in the 15 trusts in excess of the amount of the judgment. 313 F.3d at 80, Pet. App. at 12a. In its decision on appeal, notwithstanding the holding that "most . . . of the funds belong to Indonesia," 313 F.3d at 75, Pet. App. 2a, the Second Circuit "direct[ed] the district court, in the course of [its further] proceedings, to continue the stay presently in force or to substitute one similar until such time as the parties' rights to the disputed funds are finally determined," 313 F.3d at 93, Pet. App. 34a. As a result, nearly half a billion dollars remain restrained—roughly $285 million in the 15 trusts, and roughly $200 million in the remaining unadjudicated trusts.

REASONS FOR GRANTING THE PETITION

The Court should grant review to clarify the application of the FSIA's "property in the United States" limitation to intangible property, such as that at issue here, a subject that has been treated inconsistently and with some confusion by the lower courts. Doing so would contribute to the uniformity contemplated by the FSIA, protect the efficacy and reliability of this country as a world financial center, and correct a serious error that has significant adverse consequences for a sovereign that has strategic significance to the United States.

I. THE DECISION BELOW IS ERRONEOUS AND REFLECTS CONFUSION IN THE LOWER COURTS OVER APPLICATION OF THE "IN THE UNITED STATES" LIMITATION OF THE FSIA TO EXECUTION ON INTANGIBLE PROPERTY

As an agency or instrumentality of a foreign state within the meaning of the FSIA, 28 U.S.C. § 1603(a), Pertamina is entitled to its protections. *See* 313 F.3d at 75-76, Pet. App. 3a. The FSIA imposes "two prongs of analysis" to determine

whether particular sovereign property is amenable to execution, assuming that the sovereign has already waived sovereign immunity: (i) the property must be located "in the United States," and (ii) the property must be used for a commercial activity in the United States (or, in the case of a state instrumentality, the instrumentality must engage in commercial activity in the United States). *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 265 (5th Cir. 2002) (on rehearing); 28 U.S.C § 1610(a)-(b). Both prongs must be satisfied for a U.S. court to have jurisdiction to permit execution. *Id.*

This Court has discussed the commercial activity requirements of the FSIA at length in the context of the jurisdictional provisions of Sections 1604-1605 of the statute respecting immunity from suit. *See, e.g., Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (reviewing what actions are "based on a commercial activity" within the meaning of 28 U.S.C. § 1605(a)(2)). However, the Court has never decided a case involving the execution provisions of the FSIA, Sections 1609–1611.[3] It has therefore never addressed the threshold "in the United States" requirement for execution on a foreign state or state instrumentality's property under Section 1610, much less clarified how that requirement applies to intangible property rights that lack a physical situs. The Court's lack of guidance on this issue, and the inconsistent treatment of this recurring issue by the lower courts, has led to a confused state of the law, in an area where Congress has explicitly cited "the

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[3] In *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 627-28 (1983) ("*Bancec*"), the Court cited the legislative history of Section 1610(b) in the context of the presumption of independent status of "duly created instrumentalities of a foreign state," which has its counterpart here in Pertamina's posture vis-à-vis the state itself. There was no allegation below, nor could there have been, that Pertamina is not separate from the Republic of Indonesia under the standards set forth in *Bancec*.

importance of developing a uniform body of law." H.R. Rep. No. 94-1487 at 32, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6628.

To the extent that courts have grappled with the "in the United States" provision of the FSIA, they have recognized that it is more exacting than the traditional (and outdated) common law situs position assumed in *Harris v. Balk*, 198 U.S. 215 (1905). That approach deemed intangible property to reside wherever the debtor's debtor can be found.[4] By contrast, in *Fidelity Partners, Inc. v. Philippine Export & Foreign Loan Guarantee Corp.*, 921 F. Supp. 1113 (S.D.N.Y. 1996), the court found a Philippine sovereign-debtor's bank accounts to be outside the United States and thereby not subject to attachment, even though the garnishee bank was located in and subject to suit in New York. The court in *Fidelity Partners* undertook a fact-intensive analysis that demonstrated the substantial connection between the accounts and the Philippines. *Id.* at 1118. The court particularly noted the need to apply strictly the "in the United States" requirement "to preserve the limited reach of the FSIA's exceptions to immunity." *Id.* at 1119. Judge Schwartz's thoughtful reasoning remains the most extensive treatment of the FSIA's situs limitation, and therefore bears quoting:

> Thus, it appears necessary under the FSIA to ascribe a location, or situs, to the PNB accounts. In other contexts, it has been recognized that the situs of intangible assets "is in truth a legal fiction," but that "there are

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[4] *Harris v. Balk* has been overruled on the jurisdictional point it actually addressed, *see Shaffer v. Heitner*, 433 U.S. 186, 208-09 (1977). In any event, that situs rule would not support the judgment of the court of appeals. The Government of Indonesia is not "present" in New York in any relevant sense because it is not subject to jurisdiction as a garnishee under the FSIA, *see* 28 U.S.C. § 1605(a), and, to take it a step further, Pertamina (and therefore its judgment creditor, which stands in Pertamina's shoes) could not sue the Government in New York to collect the Retention Fee.

> times when justice or convenience requires that a legal situs be ascribed to them." *Severnoe Secs. Corp. v. London & Lancashire Inc.*, 255 N.Y. 120, 123, 174 N.E. 299, 300 (1931) (Cardozo, J.). This case presents such a time. Whether the PNB accounts are characterized as "debts" of PNB or as "assets" of Philguarantee, a determination of the situs of the accounts is necessary to preserve the limited reach of the FSIA's exceptions to immunity. This is especially important in the instant case, where Fidelity seeks to levy upon a foreign state's bank deposits maintained at a bank headquartered in its own country. An analysis of Philguarantee's banking relationship with PNB compels the conclusion that the situs of Philguarantee's PNB accounts is in Manila, not "in the United States" as Section 1610(b) of the FSIA requires.

Id. at 1119.

Another district court decision, *Alejandre v. Republic of Cuba*, 42 F. Supp. 2d 1317, 1340 (S.D. Fla.), *rev'd on other grounds*, 183 F.3d 1277 (11th Cir. 1999), employed a similar totality-of-the-circumstances analysis. In that case, the court held that payments to a Cuban entity through Canadian bank accounts nonetheless were "in the United States." The court did not rest on the fact that the garnishee was located in the United States. Rather, the court relied on specific facts regarding the substance and origin of the payments in question, which showed a connection with the United States much more significant than anything present here. The payments represented proceeds from telecommunication services rendered by United States companies to customers who were located in the United States. These services and proceeds owed their existence to United States government regulations, and the funds had no connection with Canada other than their placement in accounts there for payment. The court found particularly significant that "the telecommunications carriers get the funds through which they make their payments from

customers in the United States." *Id.* Indeed, the whole purpose of the arrangements at issue was to remit a share of payments received for services rendered to U.S. customers for telecommunications between the U.S. and Cuba. *See id.* at 1325. In such circumstances, the court disregarded that the funds "ultimately are exchanged in Canadian bank accounts," *id.* at 1340, and that "the connection service may occur somewhere in the international waters between the United States and Cuba," *id.* at 1341.

However, other courts—and all the courts of appeals that have been presented with FSIA situs issues—have accorded the "in the United States" prong substantially less weight. These courts have either purposefully ignored that limitation altogether, as the Second Circuit did here, or have simply acknowledged the limitation without making any effort actually to apply it. For instance, in *Connecticut Bank*, 309 F.3d at 240, the Fifth Circuit vacated the dismissal of a creditor's attempt to garnish oil royalties and tax obligations owed to the Republic of the Congo in the Congo and arising from a joint venture in the Congo. The majority opinion did not address the obvious situs issue presented in that case, and indeed indicated on rehearing that it was deliberately avoiding (and not deciding) the question. *See id.* at 265. A concurring opinion mentioned the "in the United States" issue in passing and, without any apparent analysis, reflexively equated it with the question of the situs of the debtor's debtor. *Id.* at 261-62 ("Under the undisputed facts, the property executed upon—the garnishees' intangible obligations to pay royalties—are in the United States, as required by FSIA § 1610(a). The garnishees are oil companies headquartered in Texas. The situs of a debt is the situs of the debtor in Texas."). Such confusion on this important principle of sovereign immunity warrants review by this Court.

The situs limitation also cannot be ignored based on a contractual waiver of immunity.[5] Section 1610 governs execution or attachment against a sovereign entity, ***even where that entity has waived sovereign immunity***, as is shown by the plain language of Sections 1610(a)-(c), the relevant portions of which are as follows (with emphasis added):

> (a) The property ***in the United States*** of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution . . . ***if***—
>
> (1) the foreign state ***has waived its immunity*** . . . either explicitly or implicitly.
>
> . . . .
>
> (b) [A]ny property ***in the United States*** of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution . . . ***if***—
>
> (1) the agency or instrumentality ***has waived its immunity*** . . . either explicitly or implicitly.

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[5] Here, the district court dispensed with an analysis of the FSIA by addressing waivers of immunity in the contracts that were the subject of the arbitration, on which the judgment rested. "Pertamina waived its rights under the sovereign immunity concept and waived those rights with respect to the arbitration and waived those rights with respect to recovery on any assets. Despite that, there has been, out of what I think is an abundance of caution, an attempt to comply with the Foreign Sovereign Immunities Act in respect to laying the basis for recovery on this judgment." (Transcript of Proceedings, April 5, 2002, at 78:14-20). Based on those contractual provisions, the court of appeals concluded that "Pertamina has thus waived its sovereign immunity from attachment in United States courts," and did not otherwise treat the FSIA. 313 F.3d at 83 & n.12, Pet. App. at 16a. It considered jurisdiction to have "been established pursuant to 28 U.S.C. § 1610(b)(1) by the contractual waiver of immunity." 313 F.3d at 85, Pet. App. 20a.

. . . .

> (c) ***No attachment or execution referred to in subsections (a) and (b)*** of this section ***shall be permitted*** until the court has ordered ***such*** attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

A waiver of immunity therefore serves only to trigger a judgment-creditor's right to execute under Section 1610, which by its terms extends only to "property in the United States," 28 U.S.C. § 1610(b). "The property in question must be used for a commercial activity in the United States. ***If so***, attachment in aid of execution, and execution, . . . would be permitted in any of the circumstances set forth in paragraphs (1)-(5) of section 1610(a)." H.R. Rep. No. 94-1487 at 28, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6627 (emphasis added). As seen above, one of those circumstances is where the foreign state has waived its immunity. 28 U.S.C. § 1610(a)(1). Section 1610(b) similarly allows execution "where the agency or instrumentality has waived its immunity from execution," H.R. Rep. No. 94-1487 at 29, *reprinted in* 1976 U.S.C.C.A.N. at 6628, but there is no relaxation of the "in the United States" requirement. *See Connecticut Bank*, 309 F.3d at 247 ("Even when a foreign state completely waives its immunity from execution, courts in the U.S. may execute only against property that meets these two statutory criteria," *i.e.*, the "in the United States" limitation and the commercial activity limitation); *LNC Investments, Inc. v. The Republic of Nicaragua*, No. 96 Civ. 6360, 2000 WL 745550, **3-4 (S.D.N.Y. June 8, 2000) (holding that provisions of Section 1610 apply even where sovereign entity "gives a blanket waiver of immunity from attachment and execution," and that "[t]he Court would have to ignore the clear language of §§ 1609 and 1610 to find as LNC argues [*i.e.*, that the sovereign's waiver negates the protections of Section

1610]."); *Third Avenue Associates v. Permanent Mission of the Republic of Zaire*, 787 F. Supp. 389, 393 (S.D.N.Y. 1992) (the waiver exception in Section 1610(a) "apparently extends only to property 'used for a commercial activity.'"); *Birch Shipping Corp. v. Embassy of United Republic of Tanzania*, 507 F. Supp. 311, 312 (D.D.C. 1980) ("the statute thus sets forth a two-step analysis relevant here for determining immunity: the foreign state must have waived its immunity, and the property attached must be used for a commercial purpose.").[6]

This Court should grant certiorari to review the Second Circuit's decision and clarify the approach that the lower courts should take on the "in the United States" issue. The effect of the Second Circuit's ruling is to place "in the United States" a Retention Fee that is paid and payable only in Indonesia, from the Indonesian Government, out of funds located in Indonesia, based on contracts performed in Indonesia, and under Indonesian law, despite the fact that Pertamina could neither demand payment of the fee from the Government in the United States nor sue here to compel its payment because of the Republic of Indonesia's immunity under the FSIA. The court of appeals' approach would permit wholesale incursions by federal courts into the internal affairs of foreign states and seizures of state property based solely on the existence of obligations states owe to state instrumentalities, that are created by their own law and

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[6] Indeed, the Texas Court whose judgment is being enforced here has held that the procedural limitations of Section 1610(c) apply regardless of Pertamina's "waiver." *Karaha Bodas Company L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, No. H01-634, Memorandum and Order at 3 (S.D. Tex. March 7, 2002) ("Pertamina's waiver of immunity does not waive the procedural safeguards of § 1610(c)") (citing *LNC Investments* and *Ferrostaal Metals Corp. v. S. S. Lash Pacifico*, 652 F. Supp. 420, 423 (S.D.N.Y. 1987) (notwithstanding waiver of immunity by foreign state, requiring that attachment occur only by court order under Section 1610)).

performable only within their own territory. It would also illogically expand opportunities for creditors to execute against U.S. dollar denominated assets owned by a foreign state, which are frequently more precious (as is the case here), even though the state's underlying obligation is payable in the state's local currency.

If foreign courts were to follow this same reasoning, a foreign creditor of a U.S. instrumentality such as the Export-Import Bank of the United States or the Overseas Private Investment Corporation would be allowed to seize property of the United States abroad if the United States owed any money to that instrumentality. Nor would it be much of a stretch for a foreign creditor of a State of the Union to seize United States property abroad because the federal government owes a debt to the state under, for example, United States law for Medicaid reimbursement. The likely reaction of the United States to such proceedings suggests the similar reaction of foreign states to the disregard of the situs requirement of the FSIA exemplified by the decision below.

Indeed, if the "in the United States" limitation is to be disregarded simply because Pertamina is a party to commercial contracts with third parties governed by New York law and involving a financial institution in New York, U.S. banks would lose business to London, Frankfurt, and Tokyo. Foreign parties often seek financing from U.S. money center banks, but they surely do not expect that separate legal undertakings under foreign law will thereby be transformed by U.S. law. If that were to happen, they might well seek financing elsewhere. Sovereigns, particularly in the developing world, likewise finance development projects in the U.S. through juridically distinct instrumentalities, but doing so should not be held to modify the laws establishing and regulating those instrumentalities. That is the effect of the

Second Circuit's decision, yet this is just what Congress directed the courts to guard against in FSIA cases.

> . . . The courts will have to determine whether property "in the custody of" an agency or instrumentality is property "of" the agency or instrumentality, whether property held by one agency should be deemed to be property of another, whether property held by an agency is property of the foreign state. . .
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> . . . .
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> Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another unrelated agency or instrumentality . . . . There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary.

H.R. Rep. No. 94-1487 at 28, 29-30, *reprinted in* 1976 U.S.C.C.A.N. at 6627-29 (citations omitted). The writ should be granted to effectuate these purposes.

II. REVIEW BY THIS COURT IS WARRANTED BECAUSE OF INTERNATIONAL COMITY AND FOREIGN POLICY CONCERNS

A. The Inherent Importance Of Resolving Foreign Sovereign Immunity Issues

This Court has a particular interest in foreign sovereign immunity issues. Indeed, Congress has underscored the importance of resolving interpretational questions under the FSIA because "of the potential sensitivity of actions against foreign states." H.R. Rep. No. 94-1487 at 32, *reprinted in* 1976 U.S.C.C.A.N. 6631. Moreover, actions directly involving foreign nations warrant special attention, both to foster goodwill among nations and to ensure, as a matter of comity, that the United States is afforded reciprocal treatment when it

is a party in foreign courts. *See generally Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 555 (1987) ("Comity is not just a vague political concern favoring international cooperation when it is in our interest to do so. Rather it is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill."). These concerns are especially compelling in cases such as this, which involve execution or attachment of a foreign sovereign's assets. H.R. Rep. No. 94-1487 at 27, *reprinted in* 1976 U.S.C.C.A.N. at 6626 (noting that "attachments can also give rise to serious friction in United States' foreign relations" and that "the enforcement of judgments against foreign state property remains a somewhat controversial subject in international law.").

Thus, the Court has regularly granted certiorari in cases raising questions under the FSIA. *Dead Sea Bromide Co., Ltd. v. Patrickson*, 122 S. Ct. 2658 (June 28, 2002) (Mem.) (granting certiorari to review scope of the definition of "agency or instrumentality" of a foreign state within the meaning of the FSIA); *Saudi Arabia*, 507 U.S. at 349; *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992) (reviewing whether Argentina's default on certain bonds was an act "in connection with a commercial activity" that had a "direct effect in the United States" within the meaning of 28 U.S.C. § 1605(a)(2) of the FSIA); *Argentine Republic v. Amerada Hess Shipping Corporation*, 488 U.S. 428 (1989) (reviewing whether FSIA provides sole basis for jurisdiction in action against foreign sovereign); *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (reviewing whether for purposes of sovereign immunity "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such."); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (noting that foreign sovereign immunity is a matter of "grace and comity" among

nations) (reviewing whether FSIA's grant of jurisdiction to federal courts of cases governed by state-law rule of decision violated Article III). The Court should do so here as well.

B. The Direct Impact The Decision Below Will Have On The Republic Of Indonesia Warrants Review By This Court, As A Matter Of Comity

The substantial Indonesian interests at stake particularly justify this Court's review. The court of appeals has not permitted execution on just any asset. Rather, the funds at issue are proceeds from the disposition of Indonesia's patrimony, its natural gas resources, one of the principal sources of foreign exchange for the Indonesian economy, which are owed entirely to the Republic of Indonesia, which in turn owes no debt to the judgment-creditor and has not waived its sovereign immunity.[7] These funds are important to the nation and play a critical role in maintaining and improving the health of the fragile Indonesian economy.

As the Second Circuit noted in the decision below:

> Evidence submitted by the Ministry and Pertamina suggests that twenty percent of the Indonesian national budget derives from oil and natural gas revenues. *See* Decl. of Sahala L. Gaol ¶ 11. The funds are typically used to maintain Indonesia's foreign exchange reserves, and thus to service Indonesia's foreign debt. *Id.* ¶ 12.

313 F.3d at 79, Pet. App. 9a. The evidence on which the Court of Appeals relied outlined in detail the importance of

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[7] As discussed above, the funds at issue are owed entirely to the ***Government***, and are not Pertamina's assets. Moreover, even if it could be said that the funds belong to Pertamina, the Government is the beneficiary of nearly all of them. *See* 313 F.3d at 84, Pet. App. 19a. ("And even in Jakarta, Pertamina is not entitled to the entire Retention. Regulation 41, in Article 5(3), subjects the retention to a sixty percent tax. A second regulation, Government Regulation 73, then mandates payment of a fifty percent dividend to the government. In all, Pertamina actually receives one-fifth of the Retention.").

these funds to the Indonesian economy, and the impact of their loss on the national budget and the political stability of the country. Declaration of Sahala L. Gaol ¶ 18 (March 22, 2002).

First, sharing of LNG gas revenue with Indonesia's regions is important for preserving stability in important parts of that country like Aceh Province, in northern Sumatra, a significant gas-producing region where Islamic separatist movements have been active. *Id.* In budget year 2001, for example, more than $930 million in oil and gas revenues were delivered to the regions as their shares. *Id.* A reduction of gas revenues would reduce the funds available to these regions, adversely affecting their budgets and the services they can provide, which in turn could exacerbate the already existing political and religious instabilities in places like Aceh. *Id.*

Second, a loss of these revenues would directly impact Indonesia's foreign exchange reserves, to which the revenue from Pertamina's activities is critical. *Id.* ¶ 12. The PSC Contractors pay the Government in dollars, and such proceeds, as well as other dollar payments that Pertamina must make to the Government, represent a significant percentage of the foreign exchange reserves available to the Government each year. *Id.* Moreover, Pertamina's Retention is received in Indonesian rupiah, and not the U.S. dollar reserves the court of appeals permitted to be garnished. Among other things, these foreign exchange reserves are crucial to Indonesia's ability to service its enormous foreign debt. *Id.*

Third, a loss of this magnitude would also jeopardize crucial funding by the IMF and other international organizations—funding upon which Indonesia's economic stability and continued improvement are dependent—by causing it to violate important IMF-required benchmark reforms. For instance, in its Letter of Intent to the IMF ("IMF Letter of Intent"), Indonesia set explicit goals, including reducing its deficit from 3.7 to 2.5 percent of GDP. Decl. of Sahala L.

Gaol ¶ 21. Based on these goals, the IMF approved a $341 million loan disbursement on January 29, 2002. *Id.* A loss in the amount of this judgment, however, would increase the anticipated budget deficit to over 2.67%, thus jeopardizing the release of this critical disbursement. *Id.* ¶ 15. Similarly, under the IMF Letter of Intent, Indonesia's central bank, Bank Indonesia, has committed to maintain a minimum of net international reserves ("NIR") as a reserve requirement for purposes of central bank interventions. *Id.* ¶ 16. The NIR is composed, in part, of foreign exchange assets such as dollar revenues generated by oil and gas sales that are paid to Bank Indonesia's dollar reserve account. *Id.* Under the Government's undertakings with the IMF, any lien on oil and gas revenues payable to the Government would result in the exclusion of that revenue from the foreign exchange that the Republic can count towards its agreed foreign exchange reserve targets, with the result that execution upon these revenues could result in a violation of Indonesia's NIR commitments.

C. The Decision Below Implicates United States Foreign Policy Interests

Indonesia's loss of the substantial U.S. dollar reserves at issue here—and the various detrimental effects that loss would have on the Indonesian economy—would directly and negatively affect strong United States foreign policy interests. This independently warrants certiorari. *See, e.g., JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 89 (2002) (noting that the Court granted certiorari in part because the case "implicates serious issues of foreign relations . . . .").

The United States has a strong interest in supporting Indonesia's economic recovery efforts. United States officials, in conjunction with the IMF, regularly meet with the Indonesian Government and actively participate in the development of the Government's economic program. *See, e.g.*, "U.S. Seeks

More Economic Support For Indonesia," *Jakarta Post*, November 14, 2002 ("[Randal K. Quarles, assistant secretary for international affairs,] told reporters that he was encouraged by the economic progress Indonesia had made these last 18 months . . . [and] said that on his return to Washington, he would be looking at ways on how the United States could help Indonesia move along the economic reform program, as worked out jointly with the International Monetary Fund (IMF)."); Press Release, U.S. State Department, August 2, 2002 (available at 2002 WL 25970320) (describing visit by Secretary of State Powell to Jakarta to meet with Indonesian President Megawati and the Coordinating Minister for Economics, Finance and Industry, and reproducing Secretary Powell's remarks, including "[t]he United States and Indonesia are pursuing a wide range of important issues in concert. We are expanding and deepening our bilateral ties and our economic cooperation . . . I commend the Minister for the positive steps that he and his economic team have taken toward economic and financial reform. Progress today, including the restoration and re-invigoration of relations with Indonesia's international lenders, has strengthened the currency and Indonesia's stock market.").

More generally, the United States has an unquestioned interest in participating in and supporting IMF foreign economic recovery procedures. *See Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 165 B.R. 379, 387 (S.D.N.Y. 1994), *aff'd*, 109 F.3d 850, 854-55 (2d Cir. 1997) (Congress considers international debt to be a problem that "threatens the safety and soundness of the international financial system, the stability of the international trading system, and the economic development of the debtor countries," and thus has determined that it is in the United States's interest to require debtor countries to engage in the IMF's debt resolution procedures). The Executive Branch has shown its support for such efforts through initiatives such as the Brady Plan, which

among other things calls for internal economic restructuring within debtor countries pursuant to IMF and World Bank programs. *Id.* at 388. *See also Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 522 (2d Cir. 1985) ("With respect to private debt, support for the IMF resolution strategy is consistent with both the policy aims and best interests of the United States."). Indonesia's significant but fragile steps towards these important goals of economic recovery and debt repayment depend significantly on the hard currency earned by its natural gas revenues, which the lower courts would permit to be taken here.

Moreover, Indonesia is a key ally in the United States's global campaign against terrorism. Indeed, the nation was the target of perhaps the most prominent and deadly act of international terrorism since September 11—the nightclub bombings in the resort island of Bali in October 2002—which dealt a substantial blow to the Indonesian economy. The U.S. Government has expressed support for Indonesia's anti-terror efforts and a strong interest in helping Indonesia expand its law enforcement, military, counterterrorism, and other similar programs. *See* Press Release, U.S. State Department, August 2, 2002 (remarks of Secretary Powell at p. 5). As with all of Indonesia's various budgetary commitments, the LNG revenue at issue here is crucial to Indonesia's ability to meet these goals.

In sum, all these efforts by the Indonesian Government that are important to both Indonesia and the United States—towards economic recovery, debt repayment, counter-terrorism, and others—could be set back by the execution on hundreds of millions of precious U.S. dollars owed to the Government. These interests provide compelling grounds justifying the Court to grant certiorari and overturn the court of appeals' erroneous ruling permitting execution on a Re-tention Fee despite the fact that it is not "in the United States" for purposes of Sections 1609 and 1610 of the FSIA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 14, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket Nos. 02-7513(L), 02-7515(CON), 02-7547(XAP), 02-7715(CON), 02-7717(CON), 02-7723(XAP).

KARAHA BODAS COMPANY, L.L.C.,
Petitioner-Appellee-Cross-Appellant,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA ("PERTAMINA"),
Respondent-Appellant-Cross-Appellee,

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,
Non-Party-Appellant-Cross-Appellee.

Argued: Aug. 7, 2002.
Decided: Dec. 10, 2002.

Before: CALABRESI, POOLER, and SACK, *Circuit Judges*.

SACK, *Circuit Judge*.

Respondent-appellant Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") and non-party-appellant the Ministry of Finance of the Republic of Indonesia (the "Ministry") appeal from an April 26, 2002, memorandum and order issued by the United States District Court for the Southern District of New York (Thomas P. Griesa, *Judge*) insofar as it permits petitioner-appellee Karaha

Bodas Company, L.L.C. ("KBC") to execute against a portion of the funds in several Bank of America trust accounts that are listed in the district court's order. KBC appeals the same order insofar as it denies KBC's motion to execute against the remainder of the same funds. The question on appeal concerns the ownership of the funds in the Bank of America trust accounts, which derive from sales of Indonesian liquefied natural gas ("LNG"), and whether such funds can be attached under New York law, as applicable pursuant to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 ("FSIA"). KBC's claim rests on the allegation that all such funds belong to Pertamina, and on the alternative theory that KBC was entitled to rely on Pertamina's ownership thereof. Pertamina and the Ministry respond that under Indonesian law, the funds belong to the Republic of Indonesia.

We agree with the district court's disposition of the ownership question. The district court correctly analyzed the Indonesian law that controls the ownership of the funds and correctly concluded that most, but not all, of the funds belong to Indonesia. Accordingly, we affirm.

BACKGROUND

The Parties

KBC describes itself as "a Cayman Islands limited liability company formed by two American power companies and other investors, and is 90%-owned by U.S. investors." Petitioner-Appellee's Br. at 2. The Ministry, acting on behalf of the Government of the Republic of Indonesia, is a "foreign state" within the meaning of the FSIA, 28 U.S.C. § 1603(a).[1]

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[1] 28 U.S.C. § 1603(a) defines "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Id.* None of the parties dispute that the Ministry is a foreign state for the purposes of the FSIA.

Pertamina is an oil and gas company owned and controlled by the Republic of Indonesia. Pertamina engages in oil and gas exploration, extraction, processing, marketing, transportation, and distribution. The 1971 statute creating Pertamina, Law 8 of 1971, explains that the company's goals are "to develop and carry out the exploitation of oil and natural gas . . . for the maximum prosperity of the People and the State." [2] Law of the Republic of Indonesia Number 8 Year 1971, Art. 5. The Indonesian government owns all of Pertamina's equity and controls a supervisory board, constituted pursuant to Law 8, that supervises Pertamina's management.[3] Pertamina, for purposes of the FSIA, is therefore "an agency or instrumentality of a foreign state." [4] 28 U.S.C. § 1603.

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[2] Pursuant to Government Regulation Number 27 of 1968, Pertamina was initially established as the National Oil and Gas Mining State Enterprise, but was reorganized under Law 8. Prior to Law 8's issuance, the Republic of Indonesia had authorized different state enterprises to extract and sell natural gas and oil pursuant to Articles 5 and 6 of Law 44 of 1960.

[3] Pertamina is currently in a state of legal flux because of changes in its organic statute. Under Law 22 of 2001, Pertamina must, within two years, change "from a state enterprise to a state-owned limited liability company." Decl. of Sudargo Gautama ¶ 37. Law 22 repeals Law 8 and Law 44, but leaves in place implementing regulations that supplement those laws. Draft Law of the Republic of Indonesia Number 22 of 2001, Art. 66. But "Law 22/2001 has not yet been implemented with respect to Pertamina." Supp. Decl. of Sudargo Gautama ¶ 6. The parties' experts on Indonesian law apparently agree that this case should be decided according to the pre-Law 22 regulations. *See* Decl. of Sudargo Gautama 36; Decl. of Robert N. Hornick ¶ 14.

[4] 28 U.S.C. § 1603 includes any entity in which a government has "a majority of . . . shares or other ownership interest." 28 U.S.C. § 1603(b). "A typical governmental instrumentality . . . is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 624, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983). Pertamina satisfies this description.

The KBC-Pertamina Geothermal Energy Contracts

In November 1994, KBC executed two contracts—a "Joint Operation Contract" and an "Energy Sales Contract"—with Pertamina and another Indonesian state-owned entity, Persero, for the development of geothermal energy extraction facilities in the Karaha area of West Java. In these contracts, Pertamina waived "any . . . right of immunity (sovereign or otherwise) which it or its assets now has or may acquire in the future." *See, e.g.*, Karaha Geothermal Joint Operation Contract, Art. 21.7(c); Karaha Geothermal Energy Sales Contract, § 15.8(c). Pertamina also "consent[ed] in respect of the enforcement of any judgment against it." Karaha Geothermal Joint Operation Contract, Art. 21.7(d); Karaha Geothermal Energy Sales Contract, § 15.8(d). The contracts did not contain any representations about KBC's right to attach particular assets in case of default or breach. And KBC points to no evidence, either within the contracts' text or in pre-contract negotiations, that Pertamina made any representations regarding its ownership of LNG revenues or its obligation to provide a security interest. Each contract also contained a choice of law clause specifying Indonesian law and provided that disputes would be resolved by an international arbitral tribunal constituted under the Arbitral Rules of the United Nations Commission on International Trade Law.

In 1997 and 1998, Indonesia experienced a fiscal crisis that induced political instability and the eventual collapse, on May 21, 1998, of the regime led by President Mohamed Suharto. In the course of the crisis, on September 20, 1997, the KBC projects were suspended by an Indonesian "Presidential Decree," along with approximately seventy-four other government-related infrastructure projects. In November 1997, another decree permitted the KBC projects to proceed again, but in January 1998, a third decree terminated the KBC

projects once more, despite lobbying by KBC and Pertamina, among others.

Arbitration on the Geothermal Energy Contracts

On April 30, 1998, KBC commenced arbitration in Geneva, Switzerland, alleging that the project's termination constituted a breach of the geothermal energy contracts. On September 30, 1999, the Swiss arbitral panel issued a preliminary ruling rejecting Pertamina's objections to arbitration and concluding that all of KBC's claims could be addressed in a unitary proceeding. The arbitral panel also rejected KBC's motion to treat the Republic of Indonesia as a party to the geothermal energy contracts.

In a December 18, 2000, award, the arbitral panel concluded that KBC had been "prevented from pursuing the performance of the binding contracts that it relie[d] upon for reasons beyond its control . . . [and] should not bear the consequences thereof." Final Award in an Arbitration Procedure Between KBC and Pertamina and Persero, at 31. The arbitral panel awarded KBC damages for lost investments of $111.1 million and lost profits of $150 million plus interest and fees. *Id.* at 35-47. On February 1, 2001, Pertamina filed an appeal in the Supreme Court of Switzerland. The appeal was dismissed on April 24, 2002. Pertamina also asked an Indonesian court to enjoin enforcement and annul the award.[5]

Proceedings in the Southern District of Texas

KBC sought enforcement of the award in the United States District Court for the Southern District of Texas pursuant to

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[5] Pertamina filed suit on March 14, 2002, in Indonesia, requesting both annulment of the arbitral award and an injunction preventing KBC from enforcing the arbitral award. A court in Jakarta, Indonesia enjoined KBC from taking action to enforce the judgment anywhere in the world, threatening a $500,000 per diem fine for violations.

the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, implemented by Chapter Two of the Federal Arbitration Act, 9 U.S.C. §§ 201-208. Rejecting Pertamina's numerous asserted defenses, the district court (Nancy Atlas, *Judge*) entered final judgment on December 4, 2001, in the amount of $261.1 million and interest at the rate of four percent per annum for KBC.[6] *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 190 F.Supp.2d 936, 957 (S.D.Tex. 2001). Pertamina's appeal of that order is pending before the Fifth Circuit.

KBC, in an attempt to enforce the judgment, then moved before the Southern District of Texas to register that judgment in other judicial districts within the United States pursuant to 28 U.S.C. § 1963.[7] KBC filed with the court, among other papers, an affidavit alleging that Pertamina had assets in seven New York banks. Judge Atlas held that KBC had fulfilled the requirement of 28 U.S.C. § 1610(c) that a party seeking to attach a foreign sovereign's property refrain for "a reasonable period of time" after judgment, and permitted KBC to register the judgment in Delaware, New York, and California federal district courts. On February 15, 2002, Judge Atlas also granted KBC's motion for an *ex parte* writ of garnishment against Bank of America.

Proceedings in the Southern District of New York

On February 22, 2002, KBC presented the December 4, 2001, Southern District of Texas judgment to the United

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[6] In response to the Indonesian order annulling the arbitral award, *see supra* note 5, Judge Atlas issued her own injunction barring Pertamina from requesting enforcement of the Indonesian order. Tr. of March 29, 2002 Hearing Before Judge Atlas, at 5-6. Judge Atlas's injunction has been appealed to the Fifth Circuit.

[7] 28 U.S.C. § 1963 permits registration of a judgment "when ordered by the court that entered the judgment for good cause shown." *Id.*

States District Court for the Southern District of New York for registration. The same day, the latter court issued an *ex parte* writ of execution and order to show cause pursuant to Fed R. Civ. P. 69(a) and 28 U.S.C. § 1610(c) "author[izing KBC] to execute upon any property of Pertamina within this jurisdiction in satisfaction of the outstanding final judgment, amounting, to date, in total to the sum of $261,166,654.92 plus interest from January 1, 2001." Pursuant to Fed.R.Civ.P. 69(a) and N.Y. C.P.L.R. § 5222(b),[8] the district court issued restraining notices, which KBC subsequently served upon Bank of America and several other banks.

The Nature of the Disputed Funds

This appeal concerns fifteen trust accounts at Bank of America.[9] These accounts contain funds from the sale of LNG extracted in Indonesia under arrangements called Production Sharing Contracts ("PSCs"), which are governed by Indonesian law.

As mandated by Indonesian law, Pertamina enters into PSCs with private oil and gas contractors for the extraction of Indonesian crude oil and natural gas.[10] The Republic of Indonesia is not party to the PSCs, but it must approve them.

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[8] Rule 69(a) provides, "Process to enforce a judgment for the payment of money shall be a writ of execution . . . . The procedure on execution . . . shall be in accordance with the practice and procedure of the state in which the district court is held . . . ." Fed.R.Civ.P. 69(a).

[9] The district court's analysis (and hence this appeal) does not concern trusts "containing non-PSC Operating Income: the Musi II, Exor I, Cilacap and the throughput fee portion of the East Java Pipeline trusts." Final Order ¶ 17. The district court concluded that the record was "insufficient to determine whether KBC is entitled to execution against these accounts." *Id.* ¶ 18.

[10] Geothermal energy contracts and PSCs are different. Pertamina entered into geothermal energy contracts with KBC for the purposes of developing extraction facilities. Pertamina entered into PSCs with private oil and gas contractors for the purposes of extracting oil and natural gas.

Under a PSC, the private contractor (the "PSC contractor") is responsible for all exploration, development, extraction, production, transportation, and marketing operations related to a specified geographic area under Pertamina's management. As part of their compensation, PSC contractors initially receive a share of the oil or natural gas after extraction. They then transfer the remaining oil or gas to Pertamina.

Pertamina, transports the gas for domestic sale or for conversion into LNG at liquefaction plants. Pertamina sells LNG to foreign buyers pursuant to long-term sales contracts that contain choice of law clauses specifying New York law as governing the contracts. LNG sales were the "largest single source of Pertamina sales revenue" in the last nine months of 2000. Decl. of Robert N. Hornick ¶ 22. Buyers of LNG remit payment to specified trust accounts in New York. In all such LNG sales, Pertamina, in its own name, purports to transfer title to the LNG, or title to the refined product, to the buyer. Pertamina warrants that it has "good title to the [LNG], free of all liens and encumbrances of any kind." *Id.* ¶ 23(b). Revenues from sales of natural gas are also sent to trusts in New York. The trusts "distribute the proceeds in accordance with trust agreements and ultimately to the [PSC contractor] in accordance with their respective [PSCs]." Decl. of Sahala L. Gaol ¶ 9. However natural gas is sold, and whether or not it is liquefied, proceeds from sales are first paid into trust accounts such as those at Bank of America.

Bank of America is the trustee of the accounts deposited with it. Before making any allocations or distributions, it credits all LNG revenues from a particular project, or subpart of a project, to a general account. The general accounts and other subaccounts are operated pursuant to contractual arrangements known as Trustee and Paying Agent Agreements ("TPAA") that define the trustee's obligations. TPAAs are signed by Bank of America, Pertamina, and

relevant PSC contractors, but only Pertamina has authority to direct payment. *See, e.g.,* Bontang V Trustee and Paying Agent Agreement of July 1, 1995, Art. 3.5(b)(i). Like the LNG sales contracts, the TPAAs also contain choice of law clauses specifying New York law as governing. *Id.* Art. 13.6.

Before any distribution can be made to Pertamina or the PSC Contractor, the TPAAs specify that production expenses—which include debt service payments, production costs, and trustee expenses—must be paid first. *Id.* Art. 3.3-3.4. After production payments are made, the "PSC Revenue" or the "Net Operating Income" remains in the general trust account. This remainder is essentially the net profit from the PSC, after costs have been deducted and debts have been serviced.

The PSC Revenue is then divided between Pertamina and the PSC Contractor for a particular project in contractually specified portions known as "Production Sharing Percentages." These payments are made to separate subaccounts or separate line accounts within the general trust account. *Id.* at 8. The funds at issue in this appeal are, thus, Pertamina's Production Sharing Percentage or, in the terms used in the contracts, Pertamina's share of the Net Operating Income.

Pertamina's Production Sharing Percentage is transferred directly to the Republic of Indonesia. Indeed, "Pertamina, at the direction of the Indonesian Government, has issued standing instructions to the Trustee to pay its Production Sharing Percentage to an account of the Government of Indonesia at Bank Indonesia." Decl. of Ainun Na'im ¶ 23. Evidence submitted by the Ministry and Pertamina suggests that twenty percent of the Indonesian national budget derives from oil and natural gas revenues. *See* Decl. of Sahala L. Gaol ¶ 11. The funds are typically used to maintain Indonesia's foreign exchange reserves, and thus to service Indonesia's foreign debt. *Id.* ¶ 12.

The LNG Security Arrangement

One noteworthy feature of the trust arrangements is the mechanism whereby Pertamina borrows funds for the construction of natural gas liquefaction facilities, without requiring a counterparty lender to depend on Pertamina's willingness or ability to assure repayment. For example, the record contains 1997 loan agreements for funds to create a natural gas liquefaction facility. One loan agreement explains that "certain proceeds of liquefied natural gas" that are held in trust accounts at Bank of America are the "*sole* source of repayment." Bontang VI Loan Agreement of March 4, 1997, at 2 (emphasis added). A fixed percentage of gross revenues from LNG revenues in the trust accounts is therefore allocated to loan repayment, and only after loan repayments are complete can other disbursements be made. Through this device, the LNG revenue stream structure protects lenders' interests.

The District Court's Opinion and Order

On March 23, 2002, Pertamina filed papers opposing KBC's order to show cause for a writ of execution on the ground that none of the restrained accounts contained property owned by Pertamina. The previous day, the Ministry, purporting to be a "Non-Party with Interest," had also filed a memorandum of law arguing that the restraining notices and writs of execution should be quashed.

Following supplementary briefing, the district court held a non-evidentiary hearing on April 5, 2002, and delivered an oral decision on the ownership and disposition of the restrained funds in the trust accounts. According to the district court, "the ultimate ownership of the money . . . does not have to appear in the trustee and paying agent agreement," so the TPAAs' designation of Pertamina as trust owner was not dispositive. Tr. of April 5, 2002 Hearing, at 10-11. Nor could Pertamina's practice of paying the funds

directly to the Republic of Indonesia dispose of the question. *Id.* at 51. The district court reasoned instead that the ownership of the LNG revenues in Pertamina's subaccount was a matter of Indonesian law, which explicitly allocated ownership rights in the funds. *Id.* at 80-81. Canvassing Indonesian law, the court concluded that Article 5(2) of Government Regulation 41 of 1982 vested ownership of all funds, except for a portion called the "Retention," in the Republic of Indonesia. "What is decisive on the question of property rights is a provision of Indonesian law which became effective in 1982 and article 5 of that law." *Id.* at 81. It allocated Pertamina's Production Sharing Percentage, less five percent of the Net Operating Income (which is designated Pertamina's "Retention"), to the Republic of Indonesia. This 1982 law, noted the district court, distinguished the Republic of Indonesia's interest from Pertamina's tax and dividend obligations. *Id.* at 83. Therefore, the only portion of the funds that KBC could attach was the five-percent portion—i.e., the Retention—which belonged to Pertamina. The district court memorialized its decision in a written order on April 26, 2002.

This Appeal

Pertamina and the Ministry appeal the district court's order and challenge its conclusion that the Retention is owned by Pertamina. The Ministry also contends that once the district court had concluded that the remaining funds belonged to the Republic of Indonesia, sovereign immunity foreclosed any further restraint of those funds. KBC appeals the portion of the order that is based on the district court's conclusion that KBC could not execute against the entirety of Pertamina's Production Sharing Percentage.

On June 18, 2002, we denied KBC's motion to dismiss the appeal, and permitted both the Ministry and Pertamina to appeal pursuant to either 28 U.S.C. § 1292(b), the collateral order doctrine, or both. We observed that the collateral order

doctrine might apply because this appeal raised an issue of sovereign immunity, but expressly reserved judgment on the jurisdictional issues. Finally, we modified the stay to apply only to those funds that would be necessary and sufficient to satisfy a judgment.

DISCUSSION

I. Standard of Review

In a proceeding under the FSIA, "[t]he standard of review established for district court decisions regarding subject matter jurisdiction is clear error for factual findings and *de novo* for legal conclusions." *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 930 (2d Cir.1998). *De novo* review is appropriate even where the district court supplements the complaint with "undisputed facts from the record," as the court did here. *Robinson v. Gov't of Malaysia,* 269 F.3d 133, 138 (2d Cir.2001) (citation and quotation marks omitted).

"Likewise, pursuant to Fed.R.Civ.P. 44.1, a court's determination of foreign law is treated as a question of law, which is subject to *de novo* review." *Curley v. AMR Corp.,* 153 F.3d 5, 11 (2d Cir.1998). Finally, the district court's choice of law determination is also subject to *de novo* review. *Id.*

II. Subject Matter Jurisdiction

Prior to consideration of the appeal's substance, we address two threshold subject matter jurisdiction questions: whether our statutory subject matter jurisdiction properly obtains and whether the Ministry is a proper party on appeal.

A. Statutory Appellate Jurisdiction

Ordinarily, appeals are permitted only from "final decisions of the district courts." 28 U.S.C. § 1291. One exception to this rule, contained in 28 U.S.C. § 1292(b), however, permits appellate jurisdiction over interlocutory civil orders "[w]hen a district judge . . . [is] of the opinion

that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," and so certifies in a written order. 28 U.S.C. § 1292(b). Upon entry of such an order, the court of appeals has the discretion to accept or decline jurisdiction. *Id.*

On April 24, 2002, the district court certified this case for appeal under 28 U.S.C. § 1292(b). Final Order of April 24, 2002, at 6. The prerequisites for appellate jurisdiction are satisfied. First, the interaction of federal, New York, and Indonesian law poses "substantial ground for difference of opinion." 28 U.S.C. § 1292(b). Second, our review of the district court's order will advance the litigation by resolving the disposition of funds that allegedly belong to a foreign sovereign. Pursuant to our discretion under 28 U.S.C. § 1292(b), we therefore accept jurisdiction to hear this appeal.[11]

B. The Ministry as Appellant

KBC did not name the Ministry as a party in its action to enforce the Swiss arbitral award in the Southern District of Texas. *KBC,* 190 F.Supp.2d at 939. Judge Atlas's final order names only Pertamina as a respondent. And the order certified in the Southern District of New York on February 22, 2002, again mentions Pertamina alone. Not until March 22, 2002, after the funds in the Bank of America trust accounts were attached, did the Ministry appear in the district court, then characterizing itself as a "Non-Party with Interest."

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[11] Having accepted jurisdiction under 28 U.S.C. § 1292(b), we need not determine whether the collateral order doctrine provides an alternative vehicle to hear this appeal. *See Excimer Assocs. v. LCA Vision, Inc.*, 292 F.3d 134, 138 (2d Cir.2002) (describing the collateral order doctrine).

At first blush, the Ministry's absence from the initial proceedings and its failure to intervene pursuant to Fed.R.Civ.P. 24 seem to preclude its participation in this appeal. "[O]nly parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v. Ortiz,* 484 U.S. 301, 304, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) (per curiam). But, as the Supreme Court recently made clear, the Ministry is indeed a "party" to the district court's judgment for present purposes, and can therefore properly appeal.

In *Devlin v. Scardelletti,* 536 U.S. 1, 122 S.Ct. 2005, 2008, 2013, 153 L.Ed.2d 27 (2002), the Court held that an unnamed member of a class could appeal a class action settlement at a fairness hearing even though he had failed to intervene earlier. The Court cautioned that "[t]he label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Id.* at 2010. To determine who may appeal, courts must ascertain whether putative appellants are "bound by the order from which they were seeking to appeal." *Id.* In *Devlin,* for instance, the appellant faced a "final decision of [a] right or claim sufficient to trigger his right to appeal." *Id.* (citation and internal punctuation omitted).

Similarly, we have long allowed appeal "when the nonparty has an interest that is affected by the trial court's judgment." *United States v. Int'l Bhd. of Teamsters,* 931 F.2d 177, 183-84 (2d Cir.1991) (quoting *Hispanic Soc'y v. N.Y. City Police Dep't,* 806 F.2d 1147, 1152 (2d Cir.1986), *aff'd, Marino v. Ortiz,* 484 U.S. 301, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988)); *accord West v. Radio-Keith-Orpheum Corp.,* 70 F.2d 621, 624 (2d Cir.1934). "The question therefore is whether the putative appellant can identify an 'affected interest.'" *Kaplan v. Rand,* 192 F.3d 60, 67 (2d Cir.1999). The Ministry alleges that the Republic of Indonesia owns the property encompassed by the garnishment order. Under *Devlin,*

Kaplan, and similar cases, this constitutes an "affected interest," which entitles the Ministry to join this appeal.

III. Execution Against or Attachment of Foreign Sovereigns' Property

Attachment of a foreign state's property in the United States is governed by the FSIA. In relevant part, the FSIA provides that "the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of [the FSIA]." 28 U.S.C. § 1609. Section 1610 provides different regimes for sovereign states on the one hand, and their agencies and instrumentalities on the other. First, 28 U.S.C. § 1610(a) provides that any property of a foreign sovereign that is

> used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States . . . if . . . (1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver.

Id. Second, § 1610(b), which concerns foreign states' instrumentalities, such as Pertamina, provides in relevant part that:

> any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States . . . if . . . (1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or

> instrumentality may purport to effect except in accordance with the terms of the waiver.

Id. Subsection (a) is generally thought to be narrower than subsection (b). *Connecticut Bank of Commerce v. Republic of Congo,* 309 F.3d 240, 252-65 (5th Cir.2002). While subsection (b) applies to *all* property of the agencies and instrumentalities of foreign states, subsection (a) applies only to the property of foreign states that is "used in commercial activity." *Id.*

In the appeal before us, sample geothermal energy contracts between Pertamina and KBC state that Pertamina "waive[s] any . . . right of immunity (sovereign or otherwise) which it or its assets now has or may have in the future." Karaha Geothermal Joint Operation Contract, Art. 21.7(c); Karaha Geothermal Energy Sales Contract, Art. 15.8(c). Pertamina, through its use of the trust funds to channel LNG revenues, engages in commerce in New York. Under 28 U.S.C. § 1610(b), Pertamina has thus waived its sovereign immunity from attachment in United States courts.[12]

A. Attachment Under the FSIA and New York Law

The FSIA states that when a foreign state is not protected by sovereign immunity, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. In attachment actions involving foreign states, federal courts thus apply Fed.R.Civ.P. 69(a), which requires the application of local state procedures. *See Alliance Bond Fund, Inc. v. Grupo Mexicano De Desarrollo, S.A.,* 190 F.3d 16, 20 (2d Cir.1999) (applying Rule 69(a), and hence New York law, in an FSIA action).

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[12] Because this is an appeal from an order executing a judgment against the property of Pertamina—as opposed to the property of the Ministry or the Republic of Indonesia—the sovereign immunity claims of the Ministry or the Republic of Indonesia are not before us.

In the instant action, the district court is located in New York state. We therefore apply New York law to determine what assets are "subject to enforcement, and thus available to judgment creditors." *Alliance,* 190 F.3d at 20. "New York procedure for enforcement of judgments is set out in Article 52 of the Civil Practice Law and Rules. The first section of Article 52 describes the assets that New York law has made subject to enforcement, and thus available to judgment creditors." *Id.* The relevant provision, N.Y. C.P.L.R. § 5201(b), states that:

> *Property against which a money judgment may be enforced.* A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment.

Id. In New York, then, a party seeking to enforce a judgment "stand[s] in the shoes of the judgment debtor in relation to any debt owed him or a property interest he may own." *Bass v. Bass,* 140 A.D.2d 251, 253, 528 N.Y.S.2d 558, 561 (1st Dep't 1988). Nonetheless, a party cannot "reach . . . assets in which the judgment debtor has no interest." *Id.* A determination of Pertamina's property interest in the disputed funds—i.e., whether Pertamina can "assign or transfer" any of these funds—is therefore dispositive of this appeal. N.Y. C.P.L.R. § 5201(b).

B. Ownership of the Disputed Funds

While the litigants agree that New York law governs what property can be attached, they diverge on what law governs the property rights of the Republic of Indonesia and Pertamina in the disputed funds. KBC argues that under New York law, Pertamina owns the Production Sharing Percentage because Pertamina controlled the allocation of the funds within the trust accounts and retained initial title to the LNG, which it sold to generate the disputed funds. KBC finds no

significance in the fact that much of those funds flow to the Republic of Indonesia. In KBC's view, these funds merely represent "various royalties, taxes, and dividends" which "Pertamina is obligated to pay the Government." Decl. of Robert N. Hornick ¶ 24. KBC argues that before those obligations are met, the funds belong to Pertamina. KBC's expert also argues that Indonesian law does not vest the Republic of Indonesia with any ownership interest in these funds. *See id.* at ¶¶ 24-49.

Both Pertamina and the Ministry argue to the contrary that Indonesian law deprives Pertamina of all but a future property interest, limited to five percent of the Net Operating Income, while the Republic of Indonesia has the exclusive right to the rest of Pertamina's Production Sharing Percentage. They, like the district court, identify Government Regulation 41 as providing the dispositive rule of decision:

> Article 5 (1) The retention (fee) received by Pertamina with regard to the Production Sharing Contract shall be 5% (five percent) of the Net Operating Income of the relevant Production Sharing Contract.
>
> (2) The difference between portions received by Pertamina according to each Production Sharing Contract and the retention (fee) received by Pertamina as intended in paragraph (1) of this Article *shall be the Government's portion.*

Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5 (emphasis added). According to Pertamina's expert, "[t]his [provision] means that the Government owns the Percentage Share due to Pertamina under the PSC, but must pay Pertamina the five percent fee," or the Retention. Supp. Decl. of Sudargo Gautama ¶ 4.

Pertamina also argues that even the Retention, which equals five percent of the Net Operating Income, cannot be attached. Pertamina contends that before it transfers its Production Sharing Percentage to the Republic of Indonesia,

the latter *owns* all the PSC Revenue as a result of Government Regulation 41. Only after the revenue reaches Jakarta does Pertamina receive the Retention. And even in Jakarta, Pertamina is not entitled to the entire Retention. Regulation 41, in Article 5(3), subjects the retention to a sixty percent tax. A second regulation, Government Regulation 73, then mandates payment of a fifty percent dividend to the government. In all, Pertamina actually receives one-fifth of the Retention.[13]

Resolution of this appeal requires that we determine the legal ownership of the PSC Revenues. At the threshold, we must consider which choice of law rule governs the question of ownership.

IV. Choice of Law Analysis

A. Federal or State Choice of Law Rules

"[R]ather than directing courts to apply the choice of law rules of the place of [the relevant events], the FSIA implicitly requires courts to apply the choice of law provisions of the forum state with respect to all issues governed by state substantive law." *Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China,* 923 F.2d 957, 959 (2d Cir.1991); *accord Pescatore v. Pan Am. World Airways, Inc.,* 97 F.3d 1, 12 (2d Cir.1996) ("[T]he FSIA . . . operates as a 'pass-through' to state law principles."). In *Barkanic,* we reasoned that the FSIA "expressly embraces the goal of holding foreign states liable in the same manner and to the same extent as a private individual under like circumstances."

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[13] For instance, if the PSC Revenue were $100, the Pertamina's retention would be $5, or five percent. Under the terms described in Pertamina's annual reports, though, the PSC Revenue would be divided: $35 would go to the PSC contractor, and $65 would go to Pertamina in New York, then be transferred immediately to the Ministry in Jakarta. Once the $65 reached Jarkarta, Pertamina would receive $5. After taxes and dividends, however, Pertamina would only retain $1.

Barkanic, 923 F.2d at 960 n. 3 (internal citation and quotation marks omitted). *Barkanic* suggests that New York choice of law rules govern.

The Ministry argues that *Barkanic* applies only to questions of "liability," and does not extend to questions about "the amenability of the sovereign to suit." Ministry Reply Br. at 16. The latter questions, the Ministry argues, are governed by federal common law choice of law rules. *Id.* (emphasis omitted). But in *Barkanic,* we explained that in FSIA cases, we use the forum state's choice of law rules to resolve "*all* issues," except jurisdictional ones. *Barkanic,* 923 F.2d at 959, 961 (emphasis added). Determining what property Pertamina owns is not a jurisdictional question, which would require application of federal law. Jurisdiction has already been established pursuant to 28 U.S.C. § 1610(b)(1) by the contractual waiver of immunity. Like the *Barkanic* court, we now determine only the scope of recovery.[14] New York choice of law rules therefore govern our decision.

B. New York or Indonesian Property Law

Under New York law, "[t]he first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the

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[14] Any "resort to federal common law to fill the interstices of our federated legal system, must be warranted by overriding and compelling federal concerns." *Pescatore,* 97 F.3d at 10 (citation and internal quotation marks omitted); *accord O'Melveny & Myers v. FDIC,* 512 U.S. 79, 87, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) (noting that "cases in which judicial creation of a special federal rule would be justified . . . are . . . few and restricted") (citation and internal quotation marks omitted). The Ministry's proffered interest, the uniform application of federal law, Ministry Reply Br. at 16, is "insufficient to justify imposition of federal common law," because of its "generic" and "generalized" nature. *Pescatore,* 97 F.3d at 11 (citing *O'Melveny,* 512 U.S. at 88, 114 S.Ct. 2048).

jurisdictions involved." *In re Allstate Ins. Co. & Stolarz,* 81 N.Y.2d 219, 223, 613 N.E.2d 936, 937, 597 N.Y.S.2d 904, 905 (1993); *accord Curley v. AMR Corp.,* 153 F.3d 5, 12 (2d Cir.1998). In property disputes, if a conflict is identified, New York choice of law rules require the application of an "interests analysis," in which "the law of the jurisdiction having the greatest interest in the litigation [is] applied and . . . the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict." *Koreag, Controle et Revision S.A. v. Refco F/X Assoc. Inc.,* 961 F.2d 341, 350 (2d Cir.), *cert. denied,* 506 U.S. 865, 113 S.Ct. 188, 121 L.Ed.2d 132 (1992) (citation omitted); *see also Istim, Inc. v. Chemical Bank,* 78 N.Y.2d 342, 348, 581 N.E.2d 1042, 1044, 575 N.Y.S.2d 796, 798 (1991) (applying interests analysis); *In re Estate of Clark,* 21 N.Y.2d 478, 485-86, 236 N.E.2d 152, 156, 288 N.Y.S.2d 993, 998 (1968) (same); *In re Crichton's Estate,* 20 N.Y.2d 124, 133, 228 N.E.2d 799, 805-06, 281 N.Y.S.2d 811, 819 (1967) (same); *Indosuez Int'l Fin. B.V. v. Nat'l Reserve Bank,* 279 A.D.2d 408, 408-09, 720 N.Y.S.2d 102, 103-04 (1st Dep't 2001) (same).[15]

1. Actual Conflict of Law. In the case at bar, the Republic of Indonesia and the State of New York apply the same general rules to property disputes. The Republic of Indonesia offers the only specific rules—Indonesian statutes and regulations—that determine the respective rights of Pertamina and the Republic of Indonesia in the disputed funds. New York law directs us to apply these Indonesian statutes and regulations. There is thus no actual conflict of law.

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[15] KBC argues that "the law of the situs of the disputed property generally controls." Appellee's Br. at 34. (citing 19A N.Y. Jur.2d Conflict of Laws §§ 26, 27, 31). But the New York Court of Appeals explicitly rejected the "traditional situs rule" in favor of interest analysis in *Istim,* 78 N.Y.2d at 347, 581 N.E.2d at 1044, 575 N.Y.S.2d at 798.

Under New York law, the party who possesses property is presumed to be the party who owns it. *See Pollock v. Rapid Indus. Plastics Co.,* 113 A.D.2d 520, 525, 497 N.Y.S.2d 45, 49 (2d Dep't 1985) (noting that "possession of tangible property . . . creates a rebuttable presumption of ownership"). When a party holds funds in a bank account, possession is established, and the presumption of ownership follows. *See Kolodziejczyk v. Wing,* 261 A.D.2d 927, 928, 689 N.Y.S.2d 825, 825 (4th Dep't 1999) (joint bank account creates rebuttable presumption of ownership in joint possessors); *Perkins v. Guaranty Trust Co. of New York,* 274 N.Y. 250, 261, 8 N.E.2d 849, 853 (1937) (possession of stock certificates creates rebuttable presumption of ownership).

Similarly, the Indonesian Civil Code provides that "whoever is in control of movable goods . . . shall be deemed to be the owner of such goods," Indonesian Civ.Code, art.1977, and the phrase "movable goods" includes cash held in bank accounts, Decl. of Robert N. Hornick ¶ 34.

Pertamina possesses the disputed funds. Under both New York and Indonesian law, we therefore proceed from the presumption that Pertamina owns the disputed funds. It is clear, however, that this presumption may be rebutted by evidence that the Republic of Indonesia actually controlled the disputed funds, or that Pertamina merely held the funds for the Republic of Indonesia, in the manner of a trustee.[16] *See Fragetti v. Fragetti,* 262 A.D.2d 527, 527-28, 692 N.Y.S.2d 442, 443 (2d Dep't 1999) (holding that joint bank account created presumption of joint ownership, which was

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[16] As the district court stated, Pertamina's possession of the disputed funds "is not the end of the story. Under absolute Hornbook law, the Court must look past that and must recognize any property rights in that money which belong to any other parties . . . such as the right of a beneficiary to a trust or some similar kind of property right." Tr. of April 5, 2002 Hearing, at 80. KBC does not advance any contrary proposition of Indonesian law. *See* Petitioner-Appellee's Br. at 41, 44.

rebutted by contrary evidence of the parties' intentions and relative control over the funds); *Vergari v. Kraisky,* 120 A.D.2d 739, 740, 502 N.Y.S.2d 788, 789 (2d Dep't 1986) (holding that certificate of title constituted prima facie evidence of ownership of a vehicle, which was rebutted by contrary evidence of the parties' relative dominion and control over the vehicle); *Kurtish v. Iskokovic,* 204 A.D.2d 847, 848, 612 N.Y.S.2d 263, 264 (3d Dep't 1994) (holding that a "constructive trust" exists between two parties when there is: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment); *Mendel v. Hewitt,* 161 A.D.2d 849, 850, 555 N.Y.S.2d 899, 900 (3d Dep't 1990) (stating that to determine whether a "constructive trust" exists, courts conduct "flexible" factual inquiries into the relationships between parties); *cf.* Decl. of Robert N. Hornick ¶ 34 (stating that under Indonesian law, possession establishes a presumption of ownership, but not stating that the presumption is irrebuttable). Under New York law, then, the property rights are determined by the underlying relationship between Pertamina and the Republic of Indonesia.

KBC urges us to apply New York law to this relationship, and thus, to the property rights in the disputed funds. Yet KBC has not pointed to any New York cases or statutes that purport to govern this kind of arrangement. The Republic of Indonesia is a foreign state, and Pertamina is a corporate entity of Indonesia, created by the legislative enactments and executive orders of the Republic of Indonesia. The relationship was created neither by contract nor by any other mechanism familiar to the laws of New York. It was established instead by provisions of Indonesian law uniquely applicable to the relationship itself: Law of the Republic of Indonesia Number 8 Year 1971 and Government Regulation of the Republic of Indonesia Number 41 of 1982. Under New York law, the meaning of these two provisions of Indonesian law determines the property rights of the parties. There is

thus no actual conflict between the laws of New York and the laws of Indonesia.

2. Interests Analysis. In any event, even if there were such a conflict, we are confident that Indonesian law would govern under the "interests analysis" that would be applicable under New York choice of law rules. *Cf. Allstate,* 81 N.Y.2d at 225, 613 N.E.2d at 938, 597 N.Y.S.2d at 906 (holding that "there is no conflict between New York and New Jersey law," and that even if there were a conflict, "New Jersey law [would] govern [ ]"). As the New York Court of Appeals has explained,

> Applying interests analysis, we first look to the purposes of the statutes in conflict and identify the policies which the States seek to promote through application of their laws. Then, based upon the facts of the case which relate to the statutes' purpose, we determine which State has the greater interest in having its law applied.

Istim, 78 N.Y.2d at 348, 581 N.E.2d at 1044, 575 N.Y.S.2d at 798. In the case at bar, Indonesian law sets forth a set of rules specifically resolving the ownership and disposition of the particular funds in dispute. *See, e.g.,* Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5; Law of the Republic of Indonesia Number 8 Year 1971, Art. 15; *see also* Decl. of Sudargo Gautama ¶¶ 29-39 (describing the regulation of PSC revenues). More generally, Indonesian laws also reflect a significant national interest in the eventual fate of funds from LNG exploitation. An Indonesian Constitution "Elucidation" observes, "The earth and the waters and the natural riches contained therein are the fundamentals of the people's prosperity. Therefore they should be controlled by the State and be made use of for the greatest possible prosperity of the people." Elucidation of the Indonesian Const., Art. 33. Other Indonesian laws evince similar concerns. *See* Law Substituting Gov't Regulation No. 44 Year 1960; Law of the Republic of Indonesia Number 8

Year 1971. And, unlike New York's interests, Indonesia's interests implicate the particular circumstances at issue: the use of an Indonesian governmental instrumentality to generate funds in order to maintain satisfactory foreign exchange reserves.

In contrast, the New York statutory interests implicated here are relatively attenuated: (i) the creation and operation of trusts under New York law; (ii) the execution of sales contracts that operate under New York law to obtain funds for deposit in these trusts; (iii) New York's general interest "in defining and protecting the property interests of its citizens and those who do business there," *Koreag*, 961 F.2d at 351; and (iv) New York's "interest as an international clearinghouse and market place," *Indosuez*, 279 A.D.2d at 408-09, 720 N.Y.S.2d at 104 (citation and internal quotation marks omitted).

Moreover, these generic interests are only minimally implicated in this case. Both the LNG sales contracts and the trust mechanism complete their operations before funds arrive in Pertamina's subaccount. Whatever interest New York has in proper application of its contract or trust law has *de minimis* application here. And we do not see how a decision to apply New York law would materially further New York's reputation as a cosmopolitan, as opposed to insular and provincial, financial center. Indeed, if this latter reason alone sufficed to mandate New York law, courts would never apply foreign law to cases involving property located in New York bank accounts, which has clearly not been the case. *Cf., e.g., Clark*, 21 N.Y.2d at 485-86, 236 N.E.2d at 156, 288 N.Y.S.2d at 998 (applying Virginia law to determine the ownership of property located in New York).

We conclude that even if there were a conflict between New York and Indonesian law, New York choice of law rules would mandate application of Indonesian law to determine

the relative property interests of Pertamina and the Republic of Indonesia in the disputed funds.

V. The Property Interests of the Republic of Indonesia and Pertamina in the Restrained Funds

There is some uncertainty about the theory pursuant to which KBC presses its claim to the attached funds. On the one hand, KBC argues that the disputed funds belong to Pertamina even as a matter of Indonesian law, and consequently can be attached. This theory of recovery therefore rests on the ownership of the disputed funds. On the other hand, KBC, in its brief and at oral argument, also suggested that it had been entitled to rely on Pertamina's ownership of the LNG funds, and due to that reliance, is now entitled to attach those funds, without regard to the funds' legal ownership.

We reject both arguments. Like the district court, we conclude that under Indonesian law, all of the disputed funds except for the Retention belong to the Republic of Indonesia, and that it would have been unreasonable for KBC to rely on the notion that Pertamina owned those funds.

A. The Reliance Argument

KBC's reliance argument appears to run as follows: The Republic of Indonesia has established Pertamina as a separate legal entity, comparable to a private corporation, in order to do business with various other entities in international markets. When those entities make serious claims against Pertamina's assets, however, Pertamina disclaims ownership, and invokes the sovereign immunity protections of the Republic of Indonesia. KBC hints that Pertamina was a vehicle for the Republic of Indonesia to participate in international markets without fairly accepting the consequences of such participation.

This argument rests on the premise that when KBC entered into the geothermal energy contracts, KBC relied upon Pertamina's ownership of the disputed funds, and that it was reasonable for KBC to do so. We can find no evidence in the record to support these claims.

KBC has not elicited evidence from which a court could conclude that KBC actually relied upon any representation that Pertamina made about KBC's ability to recover from the disputed funds in the event of default. KBC does not allege that before or during the negotiation of the geothermal energy contracts, Pertamina made any oral or written representation about recovery in the event of default. The geothermal energy contracts contain no reference to Pertamina's obligations to make funds available in the event of default, nor do they make any mention of LNG revenues. Neither Pertamina's separate legal status nor its previous title to the LNG supports the notion that Pertamina represented that it owned the disputed funds, or that the funds were available to KBC to satisfy a default. Moreover, neither fact establishes that Pertamina owns the proceeds from LNG sales, free of any prior obligations to the Republic of Indonesia.[17]

None of Pertamina's representations and actions, as reflected in the record, support the inference that Pertamina had an ownership interest in the disputed funds. To the

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[17] Nor can KBC rely on the structure or denomination of the disputed accounts at issue here to establish reliance. There is no evidence that KBC knew of the existence of the Bank of America trust accounts, let alone that it relied on their existence when contracting. KBC sought permission from the United States District Court for the Southern District of Texas to register its judgment in Delaware and California in addition to New York. Memorandum and Order of February 20, 2002, at 7. In New York alone, KBC served restraining notices on no less than seven banks. Writ of Execution and Order to Show Cause of February 22, 2002, at 5. This broadside approach suggests that KBC, while perhaps aware that LNG revenues existed and flowed through New York, knew nothing of these accounts, let alone who established or controlled them.

contrary, Pertamina seems to have been entirely forthright about its lack of ownership rights. Pertamina's annual report, for example, states that "[r]evenue from LNG sales, after deduction of contractually agreed cost items, is shared between the Government (65%) and the contractor (35%). From the LNG operations *PERTAMINA earns one thirteenth (1/13) or approximately 5% from the Government's share.*" *Pertamina Annual Financial Report 2000,* at 17 (emphasis added).

Although the TPAAs do not denominate the Republic of Indonesia as owner of the LNG proceeds, Pertamina presents undisputed evidence that it has consistently transferred all of its Production Sharing Percentage to the Republic of Indonesia's account at the Federal Reserve Bank of New York. And it was widely understood that the Republic of Indonesia relied on LNG funds to maintain its foreign currency reserves, which would have been more difficult had the funds belonged to Pertamina, rather than the Republic itself. *See* Decl. of Sahala L. Gaol. ¶¶ 11-12.

Further, the evidence of the LNG contracting process suggests that other persons dealing with Pertamina thought that Pertamina could not be relied on as a creditor. The LNG financing structure was designed to assure parties contracting with Pertamina that—while doing *LNG business* with Pertamina—they would not be left without financial recourse in the case of default. For instance, when money was needed to construct Pertamina's liquefaction facilities, the loan was *not* made directly to Pertamina. Rather, it was made to the trustee, Bank of America. The loan contracts described the "Borrower" as "Bank of America National Trust and Savings Association, solely as Trustee under the Trust Agreement [but] not in its individual capacity" and not "any one or more of the Producers [defined to include Pertamina]." Bontang VI Loan Agreement of March 4, 1997, at 4. The loan agreements further specified that debt payments must be made from the

LNG proceeds in the trust *before* Pertamina or the PSC contractor obtained any profit. *Id.* at 18-19. The loan agreements therefore warranted that the borrowers' interest had priority over all other "obligations and liabilities," *id.* at 38, and the TPAAs provided for payment to Pertamina and the PSC contractor only *after* such debts were satisfied, *see, e.g.*, Bontang VI Trustee and Paying Agent Agreement of March 4, 1997, at 39. PSC contractors' interests were also protected through the trust such that they did not need to rely on access to Pertamina's assets in order to be paid. *See* Decl. of Ainun Na'im ¶ 22; Decl. of Robert Hornick ¶ 23(c). The TPAA mechanism thereby ensured that parties involved in the production of LNG never needed to rely on the independence and financial viability of Pertamina nor contend with Pertamina's potential sovereign immunity assertions, nor its willingness to comply with adverse judgments.

Other sophisticated commercial counter-parties thus expressly sought contractual mechanisms to guarantee recovery without reliance on the accessibility of Pertamina's assets. This suggests that even if KBC had actually relied upon Pertamina's ownership rights, such reliance would not have been reasonable. Others were aware of complexities in the relationship between Pertamina and the Republic of Indonesia, and consequent limits on Pertamina's ability to satisfy judgments against it. We would think that KBC, no less than others, could have arranged similar protections. Having failed to bargain for such protection before the fact and having failed to identify any actual reliance, KBC now asks us in effect to rearrange *nunc pro tunc* the relations of Pertamina and the Republic of Indonesia in KBC's favor. In these circumstances, we see no reason why a sophisticated commercial entity should not be required to abide by the consequences of its bargain. We therefore reject KBC's reliance argument.

B. The Property Interest Argument

As described above, the crux of the parties' disagreement about Indonesian law hinges on a provision of Government Regulation 41:

> Article 5 (1) The retention (fee) received by Pertamina with regard to the Production Sharing Contract shall be 5% (five percent) of the Net Operating Income of the relevant Production Sharing Contract.
>
> (2) The difference between portions received by Pertamina according to each Production Sharing Contract and the retention (fee) received by Pertamina as intended in paragraph (1) of this Article shall be the Government's portion.

Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5. This provision, by using the possessive "Government's," mandates that all of the disputed funds, with the exception of the five percent that constitutes Pertamina's Retention, belong to the Republic of Indonesia. Thus, we agree that most of "the share denominated as 'Pertamina's' share under the PSCs belongs entirely to the Government," Decl. of Sudargo Gautama ¶ 4, with the exception of the Article 5(1) Retention.

KBC responds that "the 'Government's Portion' referenced in [Government Regulation 41] is not a property interest [but] simply a reference to the 'indebted obligations' [already] owed by Pertamina to the Government of Indonesia." Petitioner-Appellee's Br. at 46 (emphasis omitted). KBC contends that Law 8, the statute under which Regulation 41 was passed, creates these "indebted obligations." *Id.* at 14-16. Article 15 of Law 8 states that Pertamina's deposit of sixty percent of Net Operating Income from PSCs "shall constitute the payment" of corporate tax, various levies, and other contributions. Law of the Republic of Indonesia Number 8 Year 1971, Art. 15. KBC argues that the amount that Pertamina owes to Indonesia in taxes, levies, and

contributions is the "Government's portion." The disputed funds are, in KBC's view, owned by Pertamina and owed to Indonesia.

But KBC's interpretation of Article 5 of Government Regulation 41 is inconsistent with the surrounding statutory text. While Article 5(2) identifies in mandatory terms what "shall be the Government's portion," the very next provision imposes a "tax," which it explicitly labels as such. Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5(3). The presence of a parallel provision explicitly referencing "tax" obligations suggests that Article 5(2) describes a different kind of obligation. The terminology of Article 15 of Law 8 underscores this inference: It refers to payments that "constitute" corporate taxes, customs levies, and the like, Law of the Republic of Indonesia Number 8 Year 1971, Art. 15, which are distinguished from other obligations.

Further, Article 5(2) of Government Regulation 41 and Article 15 of Law 8 refer to different amounts. The former, which creates the "Government's portion," refers to the "*difference* between portions received by Pertamina according to each Production Sharing Contract and the retention (fee) received by Pertamina." Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5 (emphasis added). That is, the Government portion comprises, with respect to each PSC, the total amount of the Net Operating Income, *less* the amount to which the particular PSC contractors are entitled, *less* five percent of the Net Operating Income--a sum that depends upon the exact percentage to which contractors are entitled under the PSC. And, as KBC's counsel explained at oral argument, this percentage varies from contract to contract, so that the "Government's portion" also varies above and below sixty percent of Net Operating Income. Thus, the "Government's portion" is a varying amount.

Article 14 of Law 8, in contrast, refers to a *fixed* "sixty percent of the net operating income from the operations of Production Sharing Contracts prior to the division between the Enterprise and the Contractor." Law of the Republic of Indonesia Number 8 Year 1971, Art. 14. The *fixed* sixty percent that is Law 8's "indebted obligation" therefore cannot be the same thing as the *varying* percentage of the Net Operating Income that is the "Government's portion." [18]

The record also contains uncontroverted evidence that Pertamina's share of the Net Operating Income is transferred directly to the Ministry's account at the Federal Reserve Bank of New York.[19] While this does not prove that the Republic

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[18] Despite this discrepancy, KBC's expert argues that "Article 14 and 15 [of Law 8] were implemented by [Government Regulation 41]." Decl. of Robert Hornick ¶ 27. But as a matter of Indonesian law, government regulations are not implementing mechanisms for legislation. Indonesian law contains "a bewildering variety of types of laws—statutes, regulations, decrees, circulars, etc." Eddy Damian & Robert N. Hornick, *Indonesia's Formal Legal System: An Introduction,* 20 Am. J. Comp. L. 492, 523 (1972). Among the varieties of law enumerated in the aforementioned article are "Government Regulation[s]," "Presidential Decision[s]," "Regulation[s] of the Minister," and "internal memoranda." *Id.* at 524-25. This plethora of legal instruments in part ensues because the Indonesian executive branch has "considerably more executive law-making discretion than is the case, e.g. in the legal system of the U.S." *Id.* at 529. And under Indonesian law, "[e]ven statutes passed by the House of Representative commonly look[ ] to the executive orders and Presidential speeches for their inspiration and legal base." *Id.* at 507. Given the discrepancy in meaning between Law 8 and Government Regulation 41, we conclude that these rules do not exist in the hierarchal relationship described in the declaration of KBC's expert.

[19] Pertamina introduced testimony that its long-standing practice has been to hand over funds from PSCs directly to the Republic of Indonesia through a transfer to the Federal Reserve Bank of New York. *See* Decl. of Ainun Na'im ¶ 23 (noting that "standing instructions to [Bank of America exist] to pay its Production Sharing Percentage to the account of the Government of Indonesia"); Supp. Decl. of Sahala L. Gaol. ¶ 3 (same).

of Indonesia has an ownership interest in such funds, it is consistent with such a conclusion.

We also agree with other Courts of Appeals that have suggested that a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference. *See, e.g., Access Telecom, Inc. v. MCI Telecommunications Corp.*, 197 F.3d 694, 714 (5th Cir.1999), *cert. denied*, 531 U.S. 917, 121 S.Ct. 275, 148 L.Ed.2d 200 (2000) ("Recognizing the difficulty of interpreting foreign law, courts may defer to foreign government interpretations."); *see also In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir.1992) ("A court of the United States owes substantial deference to the construction France places upon its domestic law."). That Indonesia is a party to the case does not blunt this comity concern. *See Société Nationale Industrielle Arospatiale v. United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 546, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987) ("[W]e have long recognized the demands of comity in suits involving foreign states, either as *parties* or as sovereigns with a coordinate interest in the litigation." (emphasis added) (citing *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895))). Where a choice between two interpretations of ambiguous foreign law rests finely balanced, the support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas. The Republic of Indonesia, of course, insists that Pertamina's reading of the relevant Indonesian law is correct. We thus conclude that Pertamina does not own any portion of the disputed funds, with the exception of the Retention. Like a trustee, Pertamina possesses the remaining funds but has no ownership interest in them. *Cf. Wulff v. Roseville Trust Co.*, 164 A.D. 399, 404-05, 149 N.Y.S. 683, 687 (1st Dep't 1914) ("Property which a

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Such standing instructions were given in March 1997, prior to the Swiss arbitration in the case at bar. *Id.*

debtor holds in trust for others . . . is not subject to an attachment issued against his property.").

C. The Retention

Pertamina also argues that it has no right to the Retention, or, at a minimum, no right to eighty percent of the Retention. We disagree. While Pertamina may be under an obligation to transfer the Retention to the Ministry's account in New York, this fact does not alter the extant allocation of ownership interests. Pertamina has not identified any Indonesian statute or regulation that grants the Republic of Indonesia ownership rights in the Retention. "[U]nder New York law, a defendant has an interest in . . . funds if any part of the money is within the present or future control of the defendant." *Gala Enterprises, Inc. v. Hewlett Packard Co.,* 970 F.Supp. 212, 217 (S.D.N.Y.1997) (citation and internal punctuation omitted); *accord Leon v. Martinez,* 84 N.Y.2d 83, 88 n. 1, 638 N.E.2d 511, 513 n. 1, 614 N.Y.S.2d 972, 974 n. 1 (1994) ("An assignment may properly relate to a future ... right which is adequately identified . . . ."). As property within Pertamina's control, which only Pertamina controls, the Retention is validly subject to attachment.

CONCLUSION

The district court correctly adjudicated the relative ownership interests of the Republic of Indonesia and Pertamina. We therefore affirm the district court's order granting KBC's motion to attach the Retention and denying KBC's motion to attach the remainder of the disputed funds. Because this is not an appeal from a final judgment, proceedings in the district court will presumably move on to other matters. We direct the district court, in the course of those proceedings, to continue the stay presently in force or to substitute one similar until such time as the parties' rights to the disputed funds are finally determined.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. M-18-302 (TPG)

In the Matter of an Arbitration Between

KARAHA BODAS COMPANY, L.L.C.,
Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA ("PERTAMINA"),
Respondent.

FINAL ORDER

1. On February 22, 2002, petitioner Karaha Bodas Company, L.L.C. ("KBC") registered in this District a final judgement against respondent Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") that was entered on December 4, 2001 by the United States District Court for the Southern District of Texas (the "Texas Judgment"). The Texas Judgment confirmed the final arbitral award entered in *Karaha Bodas Company v. Pertamina & Others*, YD/IS 60 319, pursuant to the Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958, U.S.T. 2517, T.I.A.S. No. 6997, codified at 9 U.S.C. §§ 201-208, which awarded KBC $261,166,654.92, plus interest from January 1, 2001. Pertamina is an Indonesian state-owned oil and gas enterprise.

2. On February 22, 2002, this Court issued on an *ex parte* basis two Writs of Execution and Orders to Show Cause, pursuant to which the Court: (a) permitted KBC to issue

restraining notices (the "Restraining Notices"), which KBC served pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and Article 52 of New York Civil Practice Law and Rules ("CPLR") upon the banks listed in paragraph 3 (the "Garnishee Banks"), which Garnishee Banks KBC alleged held funds owed to Pertamina or in which Pertamina had an interest; (b) authorized certain discovery, and (c) ordered Pertamina to show cause why KBC could not execute upon any property of Pertamina within this jurisdiction in satisfaction of the judgement.

3. KBC served the restraining notices upon the following garnishee banks in New York:

Bank of America Corporation f/k/a Bank International
Bank of America National Association
Bank of America Securities
Bank of New York
Chase Securities, Inc.
Dai-Ichi Kangyo Bank, Ltd.
JP Morgan Chase Bank
Bank Indonesia
Bank of Montreal Trust Company
Bank of Taiwan New York Agency
Bank Rakyat Indonesia
PT Bank Central Asia (Persero)
PT Bank Negara Indonesia (Persero) Tbk
PT Bank Mandiri (Persero)

4. On March 25, 2002, the Ministry of Finance of the Republic of Indonesia (the "Ministry") appeared to contest ownership of the restrained assets, and to that end filed a motion to quash (the "Motion to Quash") the Restraining Notices, the Writs of Execution and Orders to Show Cause, and the subpoenas issued by KBC seeking discovery from the Garnishee Banks. The Motion to Quash was fully briefed.

5. On March 23, 2002, Pertamina filed an Opposition to KBC's Writs of Execution and Orders to Show Cause. KBC filed a reply on April 2, 2002.

6. On April 5, 2002 this Court conducted a hearing on: (i) the Order to Show Cause, and (ii) the Ministry's Motion to Quash.

7. For the reasons stated in open court on April 5, 2002, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

A. Trust Accounts Holding Pertamina's Production Sharing Percentage of Gas Sales Revenues

8. The trust accounts listed in this paragraph at the identified Gasnishee Bank below: (a) are established pursuant to various Trustee and Paying Agent Agreement; (b) relate to natural gas production projects in Indonesia conducted pursuant to Production Sharing Contracts; (c) contain revenues from natural gas, liquefied natural gas ("LNG") and liquid petroleum gas ("LPG") sales by Pertamina; and (d) are held in Pertamina's name and are subject to the Retention Fee as described in paragraph 12. These trust accounts are restrained under the Restraining Notices:

Trust accounts at Garnishee Bank of America, N.A.:

ARUN II Trust
ARUN III Trust
Bontang Excess Sales MCGC Trust
Bontang Excess Sales AQP Trust
Bontang Excess Sales Korea II Trust
Bontang Excess Sales KCO Trust
Bontang LPG PKG V Trust
Bontang LPG PKG VII Trust
Bontang II Trust
Bontang III Trust
Bontang IV Trust
Bontang V Trust

Bontang VI Trust
East Java Pipeline (PSC Revenue) Trust
ONWJ Trust

9. Each Trust identified in paragraph 8 above receives the sales proceeds arising out of specific Production Sharing Contracts; these sales proceeds are deposited by buyers into the appropriate trust account as required by contract. Pursuant to a specific Trustee and Paying Agent Agreement, the Trustee first makes payments and accruals for debt service, reserves, and other expenses and costs. The excess amount left in each general trust account after these payments are made (the "Net Operating Income") is distributed by the Trustee in accordance with the Production Sharing Percentages specified in the Production Sharing Contracts for each producer, a term defined for the Trustee and Paying Agent Agreements to include both Pertamina and the foreign contractors. A Trustee deposits each producer's share of the Net Operating Income in that producer's trust sub-account. Pertamina, as a producer, receives a share of each Production Sharing Contract.

10. The only trust and payment accounts and sub-accounts restrained are those maintained in Pertamina's name or for Pertamina's benefit.

11. Article 5(2) of Indonesian Government Regulation 41/1982 provides that the difference between the share nominally received by Pertamina according to each Production Sharing Contract and a Retention Fee payable to Pertamina as intended in Article 5(1) "shall be the Government's portion." (The "Government's Portion").

12. Article 5(1) of Indonesian Government Regulation 41/1982 provides that Pertamina receives a retention fee out of the proceeds of each Production Sharing Contract. The Retention Fee is equal to five percent (5%) of the Net Operating Income that is generated from each such contract

and that is paid to Pertamina and its production sharing partners (the "Retention Fee").

13. The Court finds that Pertamina has a property right in the trust accounts identified in paragraph 8 above, to the extent of its five percent (5%) Retention Fee, which can be executed upon in the manner allowed under New York C.P.L.R. 5222(b).

14. The Court finds that the Government of Indonesia does not have an ownership interest in any of the five percent (5%) Retention Fee, and that the provisions of Indonesian law providing for a tax and a dividend to be paid our of the five percent (5%) Retention Fee do not confer an ownership interest on the Government of Indonesia.

15. The Court finds that the Government of Indonesia has a property right in the "Government's Portion" under Article 5(2) of Government Regulation No. 41/1982 with respect to those funds held in Pertamina's name in the trust accounts identified in paragraph 8 above, and therefore, is entitled to these funds. The trust accounts cannot be executed upon to the extent of the Government's Portion.

16. Accordingly, the Ministry's Motion to Quash is GRANTED and KBC's Motion is DENIED with regard to the trust accounts listed in paragraph 8, as to the Government's Portion. KBC's Motion is GRANTED and the Ministry's Motion to Quash is DENIED only as to the amount of Pertamina's Retention Fee with regard to the trusts listed in paragraph 8.

17. In addition, to the trust accounts listed in paragraph 8, restraints have been placed in the following accounts:

Trust Accounts at Garnishee Bank of America, N.A.:

BLRE Trust
Cilacap Trust
Corridor Trust

East Java Pipeline (Throughput Fee) Trust
KMI Trust
South Sumatra Trust
West Natuna Trust

Trust Accounts at Garnishee Bank of New York:

Exor I Trust
MUSI II Trust

18. The Court finds that the present record is insufficient to determine whether KBC is entitled to execution against these accounts. These accounts, to some extent, raise individual factual issues and, in any event, do not involve the same uniform questions of law raised with respect to the trust accounts listed in paragraph 8.

19. The Court certifies that the order contained in paragraphs 8-16 involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation.

20. The order contained in paragraphs 8-16 is stayed pending the conclusion of proceedings in the Court of Appeals.

/s/ Thomas P. Griesa
United States District Court Judge

Dated: New York, New York
April 24, 2002

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

[Filed Jan. 13, 2003]

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th Day of January, two thousand three.

Docket No. 02-7513(L)
02-7515(CON)
02-7547(XAP)
02-7715(CON)
02-7717(CON)
02-7723(XAP)

KARAHA BODAS COMPANY, L.L.C.,
Petitioner-Appellee-Cross-Appellant,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS
BUMI NEGARA ("PERTAMINA"),
Respondent-Appellant-Cross-Appellee,

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,
Non-Party-Appellant-Cross-Appellee.

A petition for panel rehearing, having been filed herein by appellant, Ministry of Finance of the Republic of Indonesia.

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is DENIED.

FOR THE COURT
ROSEANN B. MACKECHNIE

By: /s/ Arthur Heller
ARTHUR HELLER
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

[Filed Jan. 13, 2003]

ROSEANN B. MACKECHNIE
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KARAHA BODAS COMPANY, L.L.C.,
Petitioner-Appellee-Cross-Appellant,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS
BUMI NEGARA ("PERTAMINA"),
Respondent-Appellant-Cross-Appellee,

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,
Non-Party-Appellant-Cross-Appellee.

A petition for panel rehearing, having been filed herein by appellant, Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina").

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is DENIED.

FOR THE COURT
ROSEANN B. MACKECHNIE

By: /s/ Arthur Heller
ARTHUR HELLER
Administrative Attorney

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Dec. 10, 2002]

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 10th day of December, two thousand and two.

Before: Hon. Guido Calabresi,
Hon. Rosemary S. Pooler,
Hon. Robert D. Sack,
Circuit Judges.

Docket Nos. 02-7513(L), 02-7515(CON), 02-7547(XAP),
02-7715(CON), 02-7717(CON), 02-7723(XAP)

KARAHA BODAS COMPANY, L.L.C.,
Petitoner-Appellee-Cross-Appellant,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS
BUMI NEGARA ("PERTAMINA"),
Respondent-Appellant-Cross-Appellee,

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,
Non-Party-Appellant-Cross-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

On consideration whereof, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is AFFIRMED in accordance with the opinion of this Court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

/s/ Arthur M. Heller
ARTHUR M. HELLER
Motions Staff Attorney

ISSUED AS MANDATE: JAN 27, 2003

A TRUE COPY
Roseann B. Mackechnie, Clerk

By: [Illegible]
Deputy Clerk

Nos. 02-1509 & 02-1510

IN THE

Supreme Court of the United States

Supreme Court, U.S.
MAY 2 2003
CLERK

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in holding that funds in bank accounts in New York, which a foreign judgment debtor holds and possesses in its own name, which are under its exclusive control, and which it has an undisputed statutory right to retain, are, as a factual matter, "property in the United States" for purposes of the Foreign Sovereign Immunities Act and are therefore attachable under New York law.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Karaha Bodas Company, L.L.C., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Respondent Karaha Bodas Company, L.L.C. ("KBC") respectfully submits this brief in opposition to the Petitions for a Writ of Certiorari (the "Petitions") filed on April 14, 2003 by Petitioner Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") and by Petitioner Ministry of Finance of the Republic of Indonesia (the "Ministry"). For the reasons that follow, KBC believes that the Second Circuit's decision was decided correctly, and that the Petitions should be denied.

STATUTES AND RULE INVOLVED

In addition to the statutes identified by Petitioners, the following statutes are pertinent to the correct resolution of this case: Fed. R. Civ. P. 69; N.Y. C.P.L.R. § 5201; N.Y. C.P.L.R. § 5222. The relevant provisions of each of these statutes are reproduced at Resp. App. A, at 1a, 3a and 6a.

COUNTER-STATEMENT

This is a straightforward commercial case involving a recalcitrant judgment debtor, Pertamina, which refuses to pay the Swiss arbitration award rendered against it, refuses to pay lawful judgments enforcing that award in the United States, Hong Kong, and Singapore, and refuses to post any appellate bonds.

As a result of Pertamina's breach of its geothermal energy contracts with KBC, KBC initiated arbitration in Switzerland in accordance with the underlying contracts. On December 18, 2000 the arbitration tribunal found that Pertamina had breached the contracts, and it awarded KBC $261.1 million.

Pet. App., at 5a.[1] On February 1, 2001, Pertamina filed an appeal with the Supreme Court of Switzerland, asserting that Swiss law governed the arbitration. The Swiss Court rejected the appeal because Pertamina failed to pay its filing fees in a timely manner. *See* Resp. App. J, at 155a.

In early 2001, KBC began proceedings to enforce the arbitration award in the United States District Court for the Southern District of Texas (the "Houston Court"). On December 4, 2001, the Houston Court confirmed the arbitration award and entered a final judgment in the amount of $261.1 million, with interest. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F. Supp. 2d 936 (S.D. Tex. 2001) ("Houston Judgment"), Resp. App. B, at 12a. Pertamina appealed the Houston Court's decision to the United States Court of Appeals for the Fifth Circuit, but it refused to post a supersedeas bond to stay enforcement of the judgment.

After entry of the Houston Judgment and Pertamina's refusal to file a supersedeas bond, KBC began proceedings in the United States District Court for the Southern District of New York (the "District Court") to execute upon the Houston Judgment. Pet. App., at 38a, ¶¶ 2-3. On February 22, 2002, KBC registered the Houston Judgment in the District Court. On the same date, the District Court, pursuant to Rule 69(a) and Section 5222 of the New York Civil Practice Law and Rules,[2] issued notices upon Bank of America and

---

1. As used herein, all citations to "Pet. App." refer to the Petition for Writ of Certiorari filed by the Ministry.

2. Rule 69(a) provides that "[t]he procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with (Cont'd)

several other banks in New York restraining the transfer or disposition of funds contained in several trust accounts held in Pertamina's name. *Id.*, at 39a, ¶ 3. As described by the Court of Appeals in the judgment below, all proceeds of the sale of liquefied natural gas through production sharing contracts are channeled through trust accounts at banks in New York. *Id.*, at 8a-9a. Both Pertamina and the Ministry then moved to quash the restraints by claiming that all of the restrained funds belong not to Pertamina, but instead to the Ministry and/or the Republic of Indonesia. *Id.*, at ¶ 4.

On April 26, 2002, the District Court ruled that a portion of the restrained funds – known as the "Retention Fee" – is Pertamina's property and is therefore subject to attachment under New York law (as applied by Rule 69(a)). Pet. App., at 38a-47a. As to the remaining funds, the District Court ruled that they belong to the Indonesian Government and thus are not subject to execution. *Id.*, at 42a, ¶¶ 12-15.

At about the same time that KBC began execution in New York, Pertamina changed its argument about the law governing the arbitration. Before the Indonesian proceeding, Pertamina had argued that because Switzerland was the legal situs of the arbitration, its law governed. Now, abandoning its prior assertions, it argued that Indonesian law, not Swiss law, governed the arbitration, and that Indonesian courts thus had authority to annul the award. *See* Resp. App. J, at 155a.

(Cont'd)
the practice and procedure of the state in which the district court is held[.]" Fed. R. Civ. P. 69(a). By effect of this rule, execution procedures with respect to cases pending in New York federal courts are governed by Article 52 of the New York Civil Practice Law and Rules, and the service and effect of restraining notices are governed by Section 5222 thereof. *See* N.Y. C.P.L.R. § 5222 (2000).

On March 14, 2002 Pertamina filed suit in Indonesia, asking the court there to annul the arbitration award and to enjoin KBC from enforcing the arbitration award anywhere in the world, including Houston and New York. Pet. App., at 5a & n.5.

In response to Pertamina's attempt to oust the U.S. courts of their jurisdiction, the Houston Court on March 29, 2002 issued a temporary restraining order enjoining Pertamina from seeking the Indonesian injunction. Resp. App. C, at 57a. Pertamina "knowingly" refused to comply with the order, and on April 9, 2002, the Houston Court held Pertamina in contempt as a result of its noncompliance with the order. *Id.*, at 59a. Immediately thereafter, the Houston Court found that under the Convention on Recognition and Enforcement of Foreign Arbitral Awards, the Indonesian Court had no jurisdiction to annul the award. Accordingly, on April 26, 2003, the Houston Court entered a preliminary injunction against Pertamina, ordering it to stop prosecuting the Indonesia action. Resp. App. D, at 62a. Pertamina appealed the preliminary injunction, but on May 17, 2002, the Fifth Circuit summarily refused any emergency relief. Resp. App. E, at 88a. Despite the Houston Court's preliminary injunction, the Fifth Circuit's denial of emergency relief, and subsequent Houston Court orders on June 28, 2002 and July 19, 2002 directing Pertamina to discontinue its prosecution of the Indonesian proceeding, *see* Resp. App. F & G, at 89a-91a, Pertamina continued the action. On August 27, 2002 the Indonesian Court purportedly annulled the arbitration award. As a result of Pertamina's defiance of the injunction, on April 24, 2002, KBC filed a second motion for contempt with the Houston Court. *See* Resp. App. G, at 93a. This second contempt motion has been deferred pending the Fifth Circuit's resolution of Pertamina's appeal of the Houston Court's preliminary injunction. *See* Resp. App. H, at 104a.

Simultaneous with KBC's action in New York to execute upon the Houston Judgment, KBC began award enforcement proceedings in Hong Kong, Singapore, and Canada. On March 15, 2002 the High Court of the Special Administrative Region of Hong Kong, Court of First Instance (the "Hong Kong Court"), entered a judgment confirming the arbitration award. Resp. App. I, at 105a. Pertamina moved to set aside the Hong Kong Court's judgment, in part because of the purported Indonesian annulment, and the case was tried in early 2003. On March 27, 2003 the Hong Kong Court denied Pertamina's set-aside motion. Just as the Houston Court had done, the Hong Kong court concluded that Pertamina had changed its argument about the law governing the arbitration at the "eleventh hour," and it unequivocally and emphatically rejected Pertamina's contention that the Indonesian Court had jurisdiction to annul the arbitration award. *See id.*

On December 3, 2002 after the Indonesian Court purported to annul the arbitration award, Pertamina moved the Houston Court to vacate its prior judgment enforcing the award. On April 17, 2003 the Houston Court denied Pertamina's motion, finding again, and just as the Hong Kong Court had, that the Indonesian Court had no jurisdiction to annul the award. Resp. App. J, at 169a.

Meanwhile, at the same time Pertamina was seeking to annul the award in Indonesia, it and the Ministry appealed to the Second Circuit the decision of the New York District Court allowing KBC to attach the Retention Fee. Following oral argument, the Court of Appeals affirmed the District Court's order in all respects on December 10, 2002. Pet. App., at 2a. In doing so, the Court of Appeals conducted a two-part analysis of the District Court's order. First, the Court of

Appeals considered Pertamina's and the Ministry's arguments concerning the applicability of the FSIA, properly concluding that because Pertamina had contractually waived its sovereign immunity and had engaged in commerce in New York, it was not entitled to immunity from attachment under the FSIA. Pet. App., at 17a. With respect to the Ministry's independent FSIA claims, the Court of Appeals concluded that because none of the Ministry's funds were subject to attachment under the District Court's order, its sovereign immunity claims were not properly before the Court. *Id.*, n.12. With respect to funds *not* immune from execution (*i.e.*, Pertamina's funds), the Court of Appeals – in accordance with black-letter procedural principles set forth in 28 U.S.C. § 1606 (where no immunity exists, a foreign sovereign is "liable in the same manner and to the same extent as a private individual") and Rule 69(a) of the Federal Rules of Civil Procedure – held that Pertamina's funds are subject to execution under New York law.

Having determined that any funds in the New York trust accounts that belonged to Pertamina (and not the Ministry) are not subject to immunity, the Court of Appeals next reviewed the District Court's analysis of the ownership of the restrained funds, concluding that the District Court's analysis was correct. The Court of Appeals first conducted a choice of law analysis and concluded that the ownership of the restrained funds was properly determined by reference to Indonesian law. It found that under Indonesian law Pertamina has an exclusive interest in its Retention Fee, while the Government has an exclusive interest in the remainder. Accordingly, it affirmed the District Court's ruling that KBC can attach the Retention Fee. *See* Pet. App., at 37a.

The Second Circuit's decision was not a final disposition. It remanded the case to the District Court, and further proceedings are ongoing.[3]

Pertamina moved for rehearing in the Court of Appeals; that motion was denied. Pet. App., at 48a. These Petitions followed.

REASONS FOR DENYING THE PETITION

I. NO FOREIGN SOVEREIGN IMMUNITY QUESTION IS PRESENT

This case turns on two relatively simple questions: who owns the New York bank deposits, and whether the deposits are "property in the United States." If Pertamina owns some portion of the deposits, there is no FSIA issue because Pertamina does not contest that it has waived its immunity and that the funds in New York were used in commerce. If the Government of Indonesia owns the funds, then KBC has no right to attach the property because KBC is not a judgment creditor of the Government. And because KBC has no right to attach the Government's property, it is irrelevant that such property is immune from attachment.

As to the location of the funds, neither court saw any reason to question that the property to be attached is in New York. The deposits are at New York banks, Pertamina has

---

3. Three motions are currently pending before the District Court: (1) KBC's Motion for Execution or Turnover of 5% of Net Operating Income, (2) Pertamina's Motion to Stay Execution, and (3) the Ministry's Motion to Vacate Immediately Restraining Notices on LNG Revenues Held to Belong to the Government of Indonesia. Each of these motions has been preliminarily set down by the District Court for oral argument on May 23, 2003.

an undisputed statutory right to the Retention Fee, and it presently possesses and controls the deposits. Under those circumstances, it is clear that the attached property is "in the United States."

In determining ownership of the New York deposits, both the District Court and the Court of Appeals looked to Indonesian law. The relevant Indonesian law states:

> Article 5(1) The retention (fee) received by Pertamina with regard to the Production Sharing Contract shall be 5% (five percent) of the Net Operating Income of the relevant Production Sharing Contract.
>
> (2) The difference between portions received by Pertamina according to each Production Sharing Contract and the retention (fee) received by Pertamina as intended in paragraph (1) of this Article shall be the Government's portion.

Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5.

The Court of Appeals interpreted this Indonesian decree in accordance with its express terms:

> This provision, by using the possessive "Government's," mandates that all of the disputed funds, with the exception of the five percent that constitutes Pertamina's Retention, belong to the Republic of Indonesia.

* * *

> Pertamina also argues that it has no right to the Retention, or, at a minimum, no right to eighty percent of the Retention. We disagree. While Pertamina may be under an obligation to transfer the Retention to the Ministry's account in New York, this fact does not alter the extant allocation of ownership interests. Pertamina has not identified any Indonesian statute or regulation that grants the Republic of Indonesia ownership rights in the Retention.

Pet. App., at 32a, 36a.

Thus, applying Indonesian law, the Second Circuit concluded that Pertamina has an exclusive ownership interest in the portion of the deposits held in its name in New York that constitute the Retention Fee, and that the Republic has no ownership interest whatsoever in the Retention Fee. Indeed, neither Pertamina nor the Ministry appeals the Court of Appeals' decision that Pertamina has an exclusive statutory right to the Retention Fee.

Following the mandate of the FSIA, the Second Circuit looked to New York attachment law:

> The FSIA states that when a foreign state is not protected by sovereign immunity, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. In attachment actions involving foreign states, federal courts thus apply Fed. R. Civ. 69(a), which requires the application of local state procedures. *See Alliance Bond Fund, Inc. v. Grupo Mexicano de*

> *Desarrollo, S.A.*, 190 F.3d 16, 20 (2d Cir. 1999) (applying Rule 69(a), and hence New York law, in an FSIA action).

Pet. App., at 17a-18a. The relevant New York provision states that:

> **Property against which a money judgment may be enforced**. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment.

N.Y. C.P.L.R. § 5201(b) (emphasis supplied)

The Second Circuit then found that:

> [U]nder New York law, a defendant has an interest in . . . funds if any part of the money is within the present or future control of the defendant." *Gala Enterprises, Inc. v. Hewlett Packard Co.*, 970 F. Supp. 212, 217 (S.D.N.Y. 1997) (citation and internal punctuation omitted); *accord Leon v. Martinez,* 84 N.Y.2d 83, 88 n.1, 638 N.E.2d 511, 513 n.1, 614 N.Y.S.2d 972, 974 n.1 (1994) ("An assignment may properly relate to a future . . . right which is adequately identified. . . ."). As property within Pertamina's control, which only Pertamina controls, the Retention is validly subject to attachment.

Pet. App., at 22a. Thus, the Second Circuit concluded that under New York law Pertamina's ownership interest in the

New York deposits is subject to execution by KBC. In reaching that conclusion, the Second Circuit implicitly rejected Petitioners' arguments that the attached property is not "in" New York. In denying Petitioners' motions for rehearing, it again rejected those arguments. The Court of Appeals then remanded the case for further proceedings.

Pertamina and the Ministry, citing the FSIA requirement that property to be attached must be "in the United States," again argue that the attached property is not "in" the United States because Pertamina takes final possession of its Retention Fee in Indonesia.

It is difficult to credit this argument. Pertamina and the Ministry confuse the location where Pertamina again receives the Retention Fee with the present location of the attached property. The attached property consists of funds that Pertamina has an undisputed and exclusive statutory right to retain, and that are on deposit in Pertamina's name, subject to its possession and control, at a bank branch located in New York. The fact that in the future Pertamina may transfer the Retention Fee to the Government, which then transfers it back to Pertamina, simply does not affect whether Pertamina has an existing, attachable interest in funds that are now, quite literally, "in" New York. Because the attached property is in New York, there is no FSIA question, and under New York law, Pertamina's interest in these funds is properly attachable.

What we have here, to sum, is simply a factual dispute. Numerous federal courts have ruled that the question of a party's interest in property is a question of fact. *See, e.g., Anglemyer v. Hamilton Co. Hosp.*, 58 F.3d 533, 537 (10th Cir. 1995) (whether contract creates a property

interest is a question of fact); *Green v. City of Hamilton Housing Auth.*, 937 F.2d 1561, 1563 (11th Cir. 1991) (denying summary judgment based on question of fact with respect to property interest); *The Kentucky Co. v. Hayes*, 407 F.2d 1031, 1035 (6th Cir. 1969) (extent of property interest is question of fact); *Pope v. City of Clearwater*, 767 F. Supp. 1147, 1150 (M.D. Fla. 1991) (ruling that question of fact concerning existence of property interest was required to be resolved). Similarly, any holding as to the location of the funds was factual. Because this case turns on the factual questions of ownership of the New York deposits and their location, certiorari would be improvident. *See* Sup. Ct. R. 10 (petition for certiorari is rarely granted when asserted error consists of erroneous factual findings).

II. THE SECOND CIRCUIT'S DECISION IS IN HARMONY WITH THIS COURT'S PRECEDENTS AND THOSE OF SISTER CIRCUITS

The Second Circuit's judgment in this case is fully consistent with this Court's jurisprudence and the decisional law of other circuits. The Ministry claims that the Second Circuit decision conflicts with decisions from other circuits holding that "if property lies outside the United States, it remains absolutely immune from attachment and execution." Petition, at 20 (citing *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992); *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 260-61 (5th Cir. 2002); *Fid. Partners, Inc. v. First Trust Co. of N.Y.*, 58 F. Supp. 2d 55, 61 (S.D.N.Y. 1999)). There is no conflict with these decisions. Neither of the courts below found that the property to be attached is located outside of New York, because it is undisputed that deposits at issue, and thus Pertamina's interest, are in New York.

By contrast, in *Richmark* (a case principally involving compliance by a sovereign entity with a federal court discovery order), the court merely noted (in dictum) that the FSIA "does not empower United States courts to levy on assets outside the United States." *Richmark*, 959 F.2d at 1477. That principle is irrelevant here because the New York deposits are, obviously, in the United States.

Connecticut Bank is equally inapposite. The Fifth Circuit there vacated an order dismissing a garnishment action against Texas oil companies that owed royalties and taxes to the Republic of Congo. The court held that further factual development was required to determine whether the funds subject to the garnishment order were generated from and used in connection with commerce in the United States. Thus, the Fifth Circuit's decision focused on the "generation from and use in commerce in the United States" requirements of the FSIA, *Connecticut Bank*, 309 F.3d at 260-61, not on the location of the property. Neither Pertamina nor the Ministry disputes that the funds contained in the New York trust accounts are used in commerce in the United States, and the Second Circuit expressly found that they were. *See* Pet. App., at 17a.

Finally, the Ministry's contention that the Court of Appeals' judgment conflicts with the district court's decision in *Fidelity Partners* is also incorrect. In *Fidelity*, the bond interests in question was reflected only on the books of a bank in Manila, not the United States, as is the case here.

Pertamina and the Ministry attempt to create a circuit conflict where none exists. The Second Circuit allowed KBC to attach a portion of Pertamina's bank deposits that are indisputably in New York, and that conclusion is consistent with all existing case law.

III. THERE IS NO FOREIGN RELATIONS ISSUE

This case is little more than a deadbeat foreign corporation's refusal to pay its lawful debts. But the Ministry predicts that the Second Circuit's decision will "interfer[e] with U.S. foreign relations" and "impair the relationship between U.S. money center banks and foreign states and instrumentalities." Petition, at 4. That is simply not true, for the United States government itself views this as a run-of-the-mill commercial dispute.

The Republic of Indonesia has at least three times asked the United States Department of State to intervene in this case, *see* Resp. App. K, at 175a, and the State Department has each time refused. The State Department views this as an ordinary commercial dispute that does not implicate any sovereign interests of the United States. Thus, the Second Circuit's decision does not constitute a matter of such public importance that warrant this Court's exercise of jurisdiction.

CONCLUSION

For the foregoing reasons, the Petitions for a Writ of Certiorari should be denied, and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A — RULE AND REGULATIONS INVOLVED

UNITED STATES CODE ANNOTATED FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS VIII. PROVISIONAL AND FINAL REMEDIES

Amendments received to April 18, 2003

Rule 69. Execution

(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

(b) Against Certain Public Officers. When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Title 28, U.S.C., § 2006, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, ch. 130, § 8 (18 Stat. 401), U.S.C., Title 2, § 118, and when the court has given the certificate of probable cause for the officer's act as provided in those statutes, execution shall not issue against the officer or the officer's property but the final judgment shall be satisfied as provided in such statutes.

Appendix A

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED CIVIL PRACTICE LAW AND RULES CHAPTER EIGHT OF THE CONSOLIDATED LAWS ARTICLE 52—ENFORCEMENT OF MONEY JUDGMENTS

§ 5201. Debt or property subject to enforcement; proper garnishee

(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

(b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

Appendix A

(c) Proper garnishee for particular property or debt

1. Where property consists of a right or share in the stock of an association or corporation, or interests or profits therein, for which a certificate of stock or other negotiable instrument is not outstanding, the corporation, or the president or treasurer of the association on behalf of the association, shall be the garnishee.

2. Where property consists of a right or interest to or in a decedent's estate or any other property or fund held or controlled by a fiduciary, the executor or trustee under the will, administrator or other fiduciary shall be the garnishee.

3. Where property consists of an interest in a partnership, any partner other than the judgment debtor, on behalf of the partnership, shall be the garnishee.

4. Where property or a debt is evidenced by a negotiable instrument for the payment of money, a negotiable document of title or a certificate of stock of an association or corporation, the instrument, document or certificate shall be treated as property capable of delivery and the person holding it shall be the garnishee; except that section 8-112

of the uniform commercial code shall govern the extent to which and the means by which any interest in a certificated security, uncertificated security or security entitlement (as defined in article eight of the uniform commercial code) may be reached by garnishment, attachment or other legal process.

Appendix A

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED
CIVIL PRACTICE LAW AND RULES
CHAPTER EIGHT OF THE CONSOLIDATED LAWS
ARTICLE 52—ENFORCEMENT OF MONEY JUDGMENTS

§ 5222. Restraining notice

(a) Issuance; on whom served; form; service. A restraining notice may be issued by the clerk of the court or the attorney for the judgment creditor as officer of the court, or by the support collection unit designated by the appropriate social services district. It may be served upon any person, except the employer of a judgment debtor or obligor where the property sought to be restrained consists of wages or salary due or to become due to the judgment debtor or obligor. It shall be served personally in the same manner as a summons or by registered or certified mail, return receipt requested or if issued by the support collection unit, by regular mail, or by electronic means as set forth in subdivision (g) of this section. It shall specify all of the parties to the action, the date that the judgment or order was entered, the court in which it was entered, the amount of the judgment or order and the amount then due thereon, the names of all parties in whose favor and against whom the judgment or order was entered, it shall set forth subdivision (b) and shall state that disobedience is punishable as a contempt

of court, and it shall contain an original signature or copy of the original signature of the clerk of the court or attorney or the name of the support collection unit which issued it. Service of a restraining notice upon a department or agency of the state or upon an institution under its direction shall be made by serving a copy upon the head of the department, or the person designated by him or her and upon the state department of audit and control at its office in Albany; a restraining notice served upon a state board, commission, body or agency which is not within any department of the state shall be made by serving the restraining notice upon the state department of audit and control at its office in Albany. Service at the office of a department of the state in Albany may be made by the sheriff of any county by registered or certified mail, return receipt requested, or if issued by the support collection unit, by regular mail.

(b) Effect of restraint; prohibition of transfer; duration. A judgment debtor or obligor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he or she has an interest, except upon direction of the sheriff or pursuant to an order of the court, until the judgment or order is satisfied or vacated. A restraining notice served upon a person other than the judgment debtor or obligor is effective only if, at the time of service, he or she owes a

debt to the judgment debtor or obligor or he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest, or if the judgment creditor or support collection unit has stated in the notice that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in specified property in the possession or custody of the person served. All property in which the judgment debtor or obligor is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the judgment debtor or obligor, shall be subject to the notice. Such a person is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff or the support collection unit, except upon direction of the sheriff or pursuant to an order of the court, until the expiration of one year after the notice is served upon him or her, or until the judgment or order is satisfied or vacated, whichever event first occurs. A judgment creditor or support collection unit which has specified personal property or debt in a restraining notice shall be liable to the owner of the property or the person to whom the debt is owed, if other than

the judgment debtor or obligor, for any damages sustained by reason of the restraint. If a garnishee served with a restraining notice withholds the payment of money belonging or owed to the judgment debtor or obligor in an amount equal to twice the amount due on the judgment or order, the restraining notice is not effective as to other property or money.

(c) Subsequent notice. Leave of court is required to serve more than one restraining notice upon the same person with respect to the same judgment or order.

(d) Notice to judgment debtor or obligor. If a notice in the form prescribed in subdivision (e) has not been given to the judgment debtor or obligor within a year before service of a restraining notice, a copy of the restraining notice together with the notice to judgment debtor or obligor shall be mailed by first class mail or personally delivered to each judgment debtor or obligor who is a natural person within four days of the service of the restraining notice. Such notice shall be mailed to the defendant at his or her residence address; or in the event such mailing is returned as undeliverable by the post office, or if the residence address of the defendant is unknown, then to the defendant in care of the place of employment of the defendant if known, in an envelope bearing the legend "personal and confidential" and not indicating on the outside

thereof, by the return address or otherwise, that the communication is from an attorney or concerns a judgment or order; or if neither the residence address nor the place of employment of the defendant is known then to the defendant at any other known address.

(e) Content of notice. The notice required by subdivision (d) shall be in substantially the following form and may be included in the restraining notice:

NOTICE TO JUDGMENT DEBTOR OR OBLIGOR

Money or property belonging to you may have been taken or held in order to satisfy a judgment or order which has been entered against you. Read this carefully.

YOU MAY BE ABLE TO GET YOUR MONEY BACK

State and federal laws prevent certain money or property from being taken to satisfy judgments or orders. Such money or property is said to be "exempt". The following is a partial list of money which may be exempt:

1. Supplemental security income, (SSI);

2. Social security;

3. Public assistance (welfare);

4. Alimony or child support;

5. Unemployment benefits;

6. Disability benefits;

7. Workers' compensation benefits;

8. Public or private pensions; and

9. Veterans benefits.

If you think that any of your money that has been taken or held is exempt, you must act promptly because the money may be applied to the judgment or order. If you claim that any of your money that has been taken or held is exempt, you may contact the person sending this notice.

Also, YOU MAY CONSULT AN ATTORNEY, INCLUDING LEGAL AID IF YOU QUALIFY. The law (New York civil practice law and rules, article four and sections fifty-two hundred thirty-nine and fifty-two hundred forty) provides a procedure for determination of a claim to an exemption.

* * * *

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, DATED DECEMBER 4, 2001

United States District Court,
S.D. Texas,
Houston Division.

No. CIV.A.H 01-0634.

In the Matter of an Arbitration Between KARAHA BODAS COMPANY, L.L.C.,

Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA

Respondent.

Dec. 4, 2001

MEMORANDUM AND ORDER

ATLAS, District Judge.

This action to enforce an international arbitral award is before the Court on Petitioner Karaha Bodas Company, L.L.C.'s Motion for Summary Judgment Confirming Arbitral Award ("KBC's Motion") [Doc. # 14] to which Respondent Perusahaan Pertambangan Minyak Dan Gas Bumi Negara

("Pertamina") has responded.[1] Having reviewed the parties' briefs, all matters of record and the applicable authorities, the Court concludes that KBC's Motion should be granted.

I. *BACKGROUND FACTS*

KBC is a Cayman Islands limited liability company that contracted to develop the 400 MW Karaha Bodas Geothermal Project (the "Project") in West Java, Indonesia. Pertamina is an oil and gas corporation owned by the Government of the Republic of Indonesia and entrusted with the exploration and exploitation of geothermal resources and generation of electricity in Indonesia. PLN is a state-owned electric utility that supplies public electricity in Indonesia.

A. *The Project*

On November 28, 1994, Pertamina, PLN, and KBC entered into two contracts to establish their roles and obligations in the Project. Pursuant to the Joint Operations Contract ("JOC") between KBC and Pertamina, Pertamina was

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1. KBC also filed a Memorandum in Support of its Motion for Summary Judgment Confirming Arbitral Award [Doc. # 16] ("KBC's Memorandum"). Pertamina filed its Memorandum in Opposition to KBC's Motion for Summary Judgment ("Pertamina's Response") [Doc. # 29]. In addition, KBC filed a Reply [Doc. # 34] and Pertamina filed a Sur-reply [Doc. # 40].

PT. PLN (Persero) ("PLN"), was a Respondent at the arbitration and was originally named as a Respondent in this action. PLN was not served and has been dismissed from this case, [*see* Doc. # 44], pursuant to KBC's Notice of Dismissal [Doc. # 43].

responsible for management of the geothermal operations and KBC was designated the contractor responsible for financing the Project and building, owning, and operating the generating facilities. *See* Petitioner's Exhibit ("PX") 2, JOC. The Energy Sales Contract ("ESC") among KBC, Pertamina, and PLN, obligated PLN to purchase from Pertamina the electricity generated by KBC's facilities for specified prices. *See* PX 3, ESC.

In almost identical provisions, both the JOC and the ESC required the parties to arbitrate any disputes in Geneva, Switzerland, pursuant to the Arbitral Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Rules"). *See* JOC, Art. 13.2(a); ESC, § 8.2(a), at 18. Additionally, the arbitration provisions required the parties to appoint arbitrators within thirty days of a party's request to initiate arbitration. The JOC provided that "[e]ach party will appoint an arbitrator," while the ESC specified that "PLN on one hand, and COMPANY [KBC] and PERTAMINA on the other hand, will each appoint one arbitrator." *Id.* In the event that an arbitrator was not selected within this thirty-day time frame, both contracts provided that an arbitrator would, by default, be appointed by the Secretary General of the International Center for Settlement of Investment Disputes ("ICSID") upon the request of any party. *Id.* The JOC and the ESC also contained virtually identical provisions limiting the parties' rights to appeal or otherwise bring legal proceedings concerning a dispute subject to the arbitration provisions. JOC, Art. 13.2(d); ESC, § 8.2(d), at 19.

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The Government of Indonesia issued a Presidential Decree dated September 20, 1997 indefinitely postponing the Project. However, KBC continued development of the project based on Pertamina's and PLN's assurances that the Project suspension was temporary and would be restored. The Project was restored briefly by a Presidential Decree dated November 1, 1997, but yet another Presidential Decree dated January 10, 1998 (the "Presidential Decree") confirmed the indefinite postponement of the Project. As a result, Pertamina and PLN did not fulfill their contractual obligations to purchase the energy to be generated by KBC's facilities. In February 1998, KBC gave Pertamina and PLN notice that the Presidential Decree constituted an event of *Force Majeure* under both the JOC and the ESC. On April 30, 1998, KBC served its Notice for Arbitration.

B. *The Arbitration Proceedings*

In the Notice of Arbitration, KBC appointed Professor Piero Bernardini[2] to serve as an arbitrator. Pertamina, however, did not designate an arbitrator in the allotted time of thirty days or thereafter. Nor did Pertamina contest KBC's selection at that time. By letter dated June 2, 1998, KBC notified the ICSID of Pertamina's inaction and requested the appointment of a second arbitrator pursuant to the default appointment provisions of the contracts. *See* PX 8. The ICSID questioned KBC concerning the consolidation of disputes under the JOC and the ESC and KBC's unilateral appointment

2. Prof. Bernardini was at the time Vice Chairman of the International Chamber of Commerce's International Court of Arbitration ("ICC") and Member of the London Court of International Arbitration. KBC's Memorandum, at 6-7.

of an arbitrator, and KBC responded by letter dated June 22, 1998. *See* PX 10. The ICSID confirmed receipt of the June 2 and June 22 letters. PX 11. In a June 29, 1998 letter to all parties, the ICSID recapped the prior correspondence, noted Respondents' failure to respond, and expressed its intent to grant KBC's request to appoint the second arbitrator. *See* PX 12. The ICSID also provided to the parties at this time the name of Dr. Ahmed El-Kosheri and his accompanying curriculum vitae,[3] and requested that any objections to the appointee be proffered by July 13, 1998. The ICSID sent all the preceding correspondence to PLN by courier and to Pertamina by fax and courier. *See* PX 15. Respondents did not object or respond to the potential appointment.[4] On July 13, 1998, having received no communications from Respondents, the ICSID notified them of its intent to appoint Dr. El-Kosheri, *see* PX 16, and made the appointment on July 15, 1998, copying all parties, *see* PX 17. Dr. El-Kosheri accepted the nomination on July 16, 1998. *See* PX 18. Pursuant to the JOC and the ESC, the two appointed arbitrators selected Mr. Yves Derains as Chairman of the arbitration panel (the "Tribunal"), and duly notified the parties. *See* PX 19.

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3. Dr. El-Kosheri was also a Vice Chairman of the ICC. KBC's Memorandum, at 7.

4. KBC responded to the ICSID on July 1, 1998 (with copy to Respondents) that it had no objection to the appointment of Dr. El- Kosheri. *See* PX 13. The ICSID confirmed receipt of KBC's correspondence on July 2, with copies to Respondents. *See* PX 14. On July 10, the ICSID again forwarded the correspondence to Pertamina. *See* PX 15.

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Before proceeding on the merits of the case, PLN requested that the Tribunal first consider certain preliminary issues. *See* PX 21. The Tribunal heard the parties on these preliminary issues on November 19, 1998. Following the hearing, PLN and Pertamina, represented jointly by the same lawyers, submitted a joint memorial, *i.e.*, a memorandum, contending that KBC had improperly attempted toconsolidate claims against different parties arising under separate agreements or putative agreements and that the Tribunal had been improperly constituted as the result of (1) the nature of a multi-party arbitration and (2) KBC's failure to honor the arbitrator nomination provisions of the ESC. *See* PX 23, Respondents' Memorial Regarding Preliminary Issues. Respondents participated in further argument on their preliminary objections at a hearing on May 31, 1999.

On October 4, 1999, the Tribunal issued a unanimous Preliminary Award, which held, in pertinent part, that: (1) the Tribunal was properly constituted; (2) KBC was entitled to file its claims, based on the JOC and the ESC, in a single arbitration; and (3) the Government of Indonesia was not a proper party to the arbitration. *See* PX 28, Preliminary Award, at 34.

KBC, after a brief extension of time, filed its Revised Statement of Claim on November 24, 1999. Thereafter, Pertamina and PLN sought, and were granted, a series of extensions to file a response to KBC's Revised Statement of Claim. The Tribunal also granted Respondents' March 6, 2000 joint request for a further extension to accommodate their change of counsel. Ultimately, pursuant to an agreement of the parties that was memorialized in Procedural Order

No. 4, KBC filed a Revised Statement of Claim and First Memorial supplementing its claims on November 24, 1999; Respondents submitted a Reply and First Memorial on April 7, 2000; KBC submitted a Rebuttal and Second Memorial ("Rebuttal") on May 8, 2000; and Respondents submitted a Rejoinder to KBC's Rebuttal and Second Memorial on June 9, 2000. Procedural Order No. 4 set the hearing on the merits for June 19 through June 30, 2000. *See* PX 38.

Pertamina and PLN sought a further continuance and additional discovery after being served with KBC's Rebuttal, which they claimed contained new assertions and "significant elements of its case in chief" that had not previously been revealed. The Tribunal denied their requests. Further, the Tribunal determined that any adjustment to the proceedings, that could be necessary, would be decided at the end of the hearing. PX 57.

The hearing on the merits began June 19, 2000 and closed on June 23, 2000. The hearing resulted in a transcript of over 800 pages reflecting extensive argument of counsel and live testimony from seven witnesses. Written witness statements were also submitted by the parties. The Tribunal noted that at the conclusion of the hearing, counsel "declared that they waived their respective requests for discovery," and confirmed that they had no objection beyond those already stated as to the conduct of the proceedings. PX 71, Final Award, at 12; *see* Transcript of Arbitration, Vol. V, at 807-08, 814. Post-hearing briefs were submitted on August 7, 2000. PX 71, Final Award, at 13.

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On December 18, 2000, the Tribunal issued its Final Award which held that Pertamina and PLN had breached the ESC and that Pertamina had breached the JOC. *Id.* at 24, 47. The Tribunal reasoned that Respondents contractually assumed the risk of the harm created by the Presidential Decree. *Id.* at 19-20. Further, the Tribunal awarded KBC $111,100,000 to recoup its expenditures on the Project, $150,000,000 in future lost profits, and $66,654.92 in costs and expenses, plus four percent interest from January 1, 2001, until the date of full payment. *Id.* at 47.

KBC seeks enforcement of the Final Award in this proceeding pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 ("New York Convention"), codified at 9 U.S.C. § 201 *et seq.*

II. *STANDARD OF REVIEW*

The parties agree that the recognition and confirmation of international arbitral awards is governed by the New York Convention. *See* 9 U.S.C. § 201; *Schlumberger Tech. Corp. v. United States*, 195 F.3d 216, 217 (5th Cir.1999). "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 335 (5th Cir.1976) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974)).

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The New York Convention is formally incorporated into United States law through implementing legislation found at 9 U.S.C. §§ 201-208.

In keeping with the expeditious nature of arbitration, this implementing legislation provides for a "summary procedure" for enforcement of foreign arbitral awards. *Imperial Ethiopian Gov't*, 535 F.2d at 335. Permissible defenses are few and "the court *shall confirm* the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207 (emphasis added); *Imperial Ethiopian Gov't*, 535 F.2d at 335-36. The defenses specified in the Convention are narrowly construed to give effect to the Convention's goal of encouraging the timely and efficient enforcement of awards. *In re Arbitration Between Trans Chem. Ltd. and China Nat'l Mach. Import and Export Corp.*, 978 F.Supp. 266, 310 (S.D.Tex.1997), *aff'd*, 161 F.3d 314 (5th Cir.1998). In short, there is a "general pro-enforcement bias" manifested in the Convention. *American Const. Mach. & Equip. Corp. v. Mechanised Const. of Pakistan, Ltd.*, 659 F.Supp. 426, 428 (S.D.N.Y.1987).

The New York convention contains only seven possible defenses. 9 U.S.C. § 201, Art. V. Recognition and enforcement of the award may be refused if the losing party furnishes proof that: (a) the parties to the agreement were under some incapacity or the agreement was invalid under the law to which the parties have subjected it; (b) the party against whom the award was invoked was not given proper notice of the appointment of the arbitrator, the arbitration proceedings, or was otherwise unable to present his case;

(c) the final award deals with a difference not contemplated by the submission to arbitration or is beyond the scope of the submission to arbitration; (d) the composition of the arbitral authority or the arbitral procedure was improper and not in accordance with the agreement of the parties; or (e) the award has not yet become binding or has been stayed by a competent authority. *Id.*, Art. V(1). A court also may refuse confirmation on a arbitral award if it finds (a) the subject matter of the difference between the parties is not capable of settlement by arbitration under the law of the enforcing state or (b) enforcement of the award is or would be contrary to the public policy of the enforcing state. *Id.*, Art. V(2).

Although it is necessary for the Court to analyze potential New York Convention defenses raised by Pertamina, "[a]bsent extraordinary circumstances, a confirming court is not to reconsider the arbitrator's findings." *Europcar Italia v. Maiellano Tours*, 156 F.3d 310, 315 (2d Cir.1998). A mistake in fact or law is insufficient to refuse confirmation of an arbitral award. *Id.* at 316.

The burden of proof in confirmation proceedings rests on the party defending against enforcement of the arbitral award, in this case, Pertamina. *Imperial Ethiopian Gov't*, 535 F.2d at 336; *Empresa Constructora Contex Limitada v. Iseki, Inc.*, 106 F.Supp.2d 1020, 1024 (S.D.Cal.2000); *American Const. Mach. & Equip. Corp.*, 659 F.Supp. at 428.

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III. *CONTRACTUAL WAIVER OF OPPOSITION TO ENFORCEMENT*

As a threshold matter, the Court must determine whether Pertamina agreed in the JOC or ESC to forgo any defense against enforcement of the arbitration award. KBC contends that the following language, present in both contracts, prohibits Pertamina from opposing KBC's enforcement action:

> The award rendered in any arbitration commenced hereunder shall be final and binding upon the Parties and judgment thereon may be entered in any court having jurisdiction for its enforcement. The Parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that in accordance with Section 641 of the Indonesian Code of Civil Procedure neither Party shall appeal to any court from the decision of the arbitral panel and accordingly the Parties hereby waive the applicability of Articles 15 and 108 of Law No. 1 of 1950 and any other provision of Indonesian Law and regulations that would otherwise give the right to appeal the decision of the arbitral panel. In addition, the Parties agree that neither Party shall have any right to commence or maintain any suit or legal proceeding concerning a dispute [hereunder until the dispute[5]] has been determined in accordance

5. The bracketed text inexplicably is absent from the JOC, but the omission does not affect the meaning.

> with the arbitration procedure provided for herein and then only to enforce or facilitate the execution of the award rendered in such arbitration.

JOC, Art. 13(d); ESC, § 8(d). Pertamina contends that this provision does not constitute a waiver of its rights under the New York Convention.

Neither party has cited a case analyzing language precisely like that in the contracts at issue here. KBC relies on *In re Arbitration Between Chromalloy Aeroservices and Arab Repub. of Egypt*, 939 F.Supp. 907 (D.D.C.1996). However, the holding in that case is not precisely on point. In that case, the United States District Court for the District of Columbia found that an Egyptian ruling nullifying an arbitration award was improper because it was "the clear intent of the parties that any arbitration of a dispute arising under the Contract is not to be appealed to any court." *Id.* at 912. While *Chromalloy* supports the conclusion that language such as that quoted above constitutes a waiver of Pertamina's rightto appeal the arbitration award, the current proceeding is not an appeal but an enforcement action. *Chromalloy* did not address the affect of such language on a party's right to raise New York Convention defenses in opposition to an enforcement proceeding.

Pertamina cites *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 847 (6th Cir.1996), for the proposition that the contract provisions quoted above do not constitute a waiver of its defenses under the New York Convention. The contract at issue in *M & C Corp.*, provided that "[t]he arbitral award shall be final" and that the parties have "waived their right to any form of appeal." *Id.* The *M & C Corp.* court

determined that notwithstanding the contractual language at issue in that case, the party against whom the award was rendered was entitled to contest the validity and enforceability of the award pursuant to the New York Convention. *Id.* The Sixth Circuit was concerned that to hold otherwise "would insulate [arbitration] judgments from judicial review even in cases involving fraud, procedural irregularities, or exertion of improper influence upon arbitrators." *Id.*

The contractual provisions at issue here are broader than the one in *M & C Corp.* in that they limit not only appeals but the "right to commence or maintain any suit or legal proceeding concerning a dispute hereunder." The Court nevertheless concludes that Pertamina is entitled to rulings on the arguments it raises. The present suit is one in which KBC seeks to enforce an arbitration award which Pertamina opposes. The necessity of a suit to enforce the award was envisioned by the drafters of the JOC and ESC. Implicitly, the parties thus recognized the right to defend against such relief under the New York Convention. Had the drafters intended to deprive an unsuccessful party of all New York Convention defenses in an enforcement proceeding, the drafters could and should explicitly have said so.

The defenses permitted by the New York Convention ensure that arbitral awards meet minimum procedural standards for protecting the litigants' rights. The defenses recognized by the New York Convention do not permit the Court to address the merits of the dispute submitted to arbitration. *See Schlumberger*, 195 F.3d at 220. The Court concludes that Pertamina has not waived its New York Convention defenses to enforcement of the arbitral award.

Thus, the Court will consider the substantive points raised by Pertamina's Response.

IV. *PERTAMINA'S NEW YORK CONVENTION DEFENSES*

Article V of the New York Convention specifies seven limited exceptions to the mandatory enforcement of foreign arbitration awards. "Absent a convincing showing that one of these narrow exceptions applies the arbitral award will be confirmed." *Trans Chem.*, 978 F.Supp. at 309; *see Yusuf Ahmed Alghanim & Sons v. Toys "R" Us*, 126 F.3d 15, 20 (2d Cir.1997). Pertamina asserts three of the enumerated New York Convention defenses here: (1) the composition and procedure of the Tribunal violated the terms of the parties' agreements (Art. V(1)(d)); (2) the Tribunal deprived Pertamina of due process (Art. V(1)(b)); and (3) the arbitral award violates public policy (Art. V(2)(b)).

A. *Alleged Violations of the Parties' Agreements*

Article V, § 1(d) of the Convention provides a defense against confirmation of an arbitral award if the respondent can prove that "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." 9 U.S.C. § 201, Art. V(1)(d). At least one district court faced with an objection to enforcement of an arbitral award based on Article V(1)(d) has concluded that because of the clear "pro-enforcement bias" of the New York Convention, it is appropriate to "set aside an award based on a procedural violation only if such violation worked substantial prejudice to the complaining party." *Compagnie*

des Bauxites de Guinee v. Hammermills, Inc., No. 90-0169, 1992 WL 122712, *5 (D.D.C. May 29, 1992); *American Const. Mach. & Equip. Corp.*, 659 F.Supp. at 428. The Court finds the *Hammermills* decision well-reasoned and adopts it as persuasive authority. The Court therefore holds that Pertamina must show that there is a violation of an arbitration agreement between the parties and that the violation actually caused Pertamina substantial prejudice in the arbitration.

Pertamina argues that the Final Award should not be confirmed because first, the Tribunal improperly consolidated the disputes under the JOC and ESC into one arbitral proceeding and, second, the Tribunal was improperly constituted because KBC unilaterally chose an arbitrator in violation of the terms of § 8.2 of the ESC.[6]

1. Consolidation of KBC's Claims Under the JOC and ESC

Pertamina argues that the arbitral procedure was contrary to the parties' agreements because neither the JOC or the ESC expressly allows consolidation. Because arbitration is

6. KBC characterizes Pertamina's arguments as "arbitrability" issues, and argues that Pertamina cannot raise such issues here because it agreed to submit them for decision by the Tribunal. The Court disagrees. Disputes concerning breaches of the contracts are encompassed by the contracts' arbitration clauses. To the extent that Pertamina raises issues as to whether the arbitration procedures were in accordance with the parties' agreements, these matters are not strictly arbitrability questions. However, KBC's contention that these contract issues were fully aired before the Tribunal is well-taken. Absent some clear reason under the New York Convention, the Court will enforce the Tribunal's award.

a product of contract, courts generally are reluctant to allow consolidation unless the parties consent. *See Government of United Kingdom of Great Britain v. Boeing Co.*, 998 F.2d 68, 72 (2d Cir.1993) (district courts do not have authority to consolidate arbitrations absent the parties consent).

In this case, the Tribunal approved a single arbitration based on the "connexity" of KBC's claims and the integration of the two contracts.[7] *See* PX 28, Preliminary Award, at 26. The Tribunal found that "the parties did not contemplate the performance of two independent contracts, but the performance of a single project consisting of two closely related parties." *Id.* at 27. The Tribunal had "not the slightest doubt" that a single arbitration was appropriate due to the integration of the two contracts and the fact that the Presidential Decree, the consequences of which are at the origin of the dispute, affected both of them. *Id. Compare United Kingdom*, 998 F.2d at 69 (reversing district court consolidation of arbitration proceedings involving separate, distinct agreements between the United Kingdom and two different parties, absent the parties' agreement).

The Tribunal based its integration finding on the facts that the contracts were signed on the same day; that the JOC expressly provided that the ESC "shall be an integral part of this contract, and to the extent the provisions of the Energy Sales Contract obligate the Parties hereto, shall be deemed

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7. "Connexity," as explained in the Preliminary Award, relates to the legal relations between KBC and Pertamina on the basis of the JOC on the one hand, and between KBC, Pertamina and PLN on the basis of the ESC on the other hand. PX 28, Preliminary Award, at 26.

incorporated into this contract for all purposes"; and that the ESC provided that it and the JOC together constitute the entire agreement between the parties. PX 28, Preliminary Award, at 26-27. In essence, the Tribunal concluded that the nature of the contracts at issue is such that the parties contemplated arbitration in a single proceeding. This Court strongly concurs. In addition, it is obvious that separate arbitrations of the matters in dispute among the parties under the JOC and ESC would have required substantial duplication of evidence on liability, damages and defensive issues. Pertamina, the only Respondent in this enforcement proceeding,[8] is a party to both the JOC and the ESC. The two Respondents in the arbitration, Pertamina and PLN, were represented by the same counsel at all times during the arbitration. Further, Pertamina has not cited any case in which consolidation was deemed to be in error under similar circumstances.[9]

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8. *See supra* note 1.

9. One treatise, cited by Pertamina in support of its argument that there can be no consolidation absent consent, acknowledges "there is strong support for the view that a judicially consolidated arbitration would be enforceable under the New York Convention where allowed by the governing local law as long as all parties have agreed (1) to arbitration and (ii) to the same arbitral jurisdiction. Where the parties have in effect agreed to a *lex arbitri*, it is reasonable to infer that they have agreed to be governed by any mandatory requirements of that law regarding consolidation which may override the express choice of the parties in matters of composition and procedure of the arbitral tribunal." ALLAN REDFERN, MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 187 (2d Ed.1991). In this case, the parties agreed to arbitration and that the arbitration would be

(Cont'd)

Appendix B

The Tribunal acknowledged that "the position of each party has to be considered independently when discussing the substance of the case, on the basis of their respective legal and contractual situations" (*Id.* at 28), and carefully adhered to this precept in all its rulings. There is no evidence that the Tribunal failed to distinguish between the positions of Pertamina and PLN in the arbitration. Indeed, the Tribunal went to great lengths to address the contentions of each separately, even though Pertamina and PLN chose to submit joint memorials and were represented by the same counsel at the arbitration hearing. There is simply no showing that these findings by the Tribunal are in error and should not be enforced.

In any event, Pertamina has not demonstrated that it suffered any loss of contract rights from the consolidation. The Court concludes that the consolidation did not violate the parties' agreements. Pertamina has not proven any prejudice from the consolidation. Pertamina thus has failed to meet its burden under the New York Convention to show a violation of Article V(1)(d) that precludes enforcement of the Final Award.

2. Appointment of Arbitrators

Pertamina also contends that the procedure used to appoint the arbitrators for the arbitration proceedings violated the ESC.

(Cont'd)

conducted in Geneva, Switzerland. Thus, there is a legal foundation for the Tribunal's application of the Swiss law of "connexity" to the consolidation issue.

Appendix B

The ESC provides for the appointment of arbitrators as follows:

> PLN on one hand, and COMPANY [KBC] and PERTAMINA, on the other hand, will each appoint one arbitrator, in each case within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes, upon the request of any Party.

ESC, § 8.2(a). The JOC's procedure for arbitrators' appointment is slightly different:

> Each Party [KBC and Pertamina] will appoint an arbitrator within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes.

JOC, Art. 13.2(a). Thus, each contract provided for the appointment of arbitrators by the ICSID in the event any party failed to meet its own obligation to do so. There is no question that the Tribunal was constituted in accordance with the express terms of the JOC. The disputed issue is whether KBC's unilateral designation of the first arbitrator violated the ESC.

The Tribunal rejected the Respondent's position that in all disputes under the ESC, KBC *and* Pertamina must jointly appoint one arbitrator while PLN appointed the other. *See* PX 28, Preliminary Award, at 30. The Tribunal found that the ESC arbitration clause applies to the entire contract, not only to disputes aligning KBC and Pertamina on one side against PLN, and that therefore it defied common sense, in a dispute between KBC and Pertamina, to oblige KBC and Pertamina to jointly appoint an arbitrator. *See id.* Because the ESC does not expressly address the method for appointing arbitrators in the KBC v. Pertamina situation, the Tribunal found that the appointment of arbitrators must be made in accordance with UNCITRAL Arbitration Rules, which the parties incorporated into the ESC and which were satisfied in this case.[10] To the extent that the contract interpretation issue is an arbitrable one, the Court sees no reason under the New York Convention to reject the Tribunal's reasoned analysis of the ESC.

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10. Section 8.2(a) of the ESC provides that any dispute arising under that contract "shall finally be settled by an arbitral tribunal (the "Tribunal") under the UNCITRAL arbitration rules contained in Resolution 31/98 adopted by the United Nations General Assembly on December 15, 1976 and entitled 'Arbitration Rules of the United Nations Commission on International Trade Law' as in force at the time such arbitration commenced."

In addition, looking at the issue afresh, the Court concludes that Pertamina has not established a violation of the ESC in regard to the first (or any other) arbitrator's selection. Pertamina has not claimed, before the Tribunal or this Court, that it failed to receive KBC's April 30, 1998 Notice of Arbitration. That Notice included Prof. Bernardini as KBC's choice of arbitrator. Pertamina also has not claimed that it did not receive the ICSID's June 29 and July 13, 1998 letters, *see supra*, at 4, informing Pertamina of the ICSID's intention to appoint Dr. El-Kosheri as the second arbitrator.[11] The ICSID's action thus also indicated its acceptance of Prof. Bernardini as the first arbitrator. Nonetheless, Pertamina lodged no objection to the appointment of either Prof. Bernardini or Dr. El-Kosheri.[12]

The Court also rejects Pertamina's contention that KBC's nomination of an arbitrator without Pertamina's consent violates the ESC because Pertamina's construction of the selection procedure renders the ESC's arbitration provision illusory. Under Pertamina's interpretation, Pertamina would

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11. Pertamina apparently argued to the Tribunal that it did not name an arbitrator because it was contesting the legitimacy of the arbitration and further contended that it did not receive certain of the correspondence from the ICSID regarding KBC's request that the ICSID appoint the second arbitrator. *See* PX 28, Preliminary Award, at 8. Pertamina does not assert these arguments before the Court.

12. In fact, Pertamina expressly informed the Tribunal in its Preliminary Memorial that it had no objection to Dr. El-Kosheri, the arbitrator selected by the ICSID. *See* PX 23, at 36. Thus, Pertamina's objection is solely to fact that KBC was allowed to select one of the arbitrators.

hold the unilateral power to prevent the arbitration of disputes between it and KBC arising under the ESC simply by refusing to select or comment on KBC's proposals for an arbitrator. That is not a reasonable interpretation of the expressed intent of the parties as set forth in the ESC. The parties intended that in the event a party failed to name an arbitrator within thirty days of the request for arbitration, the ICSID would do so. In effect, that is the scenario that transpired in this case. KBC nominated an arbitrator. Pertamina had ample notice of this act. The time for Pertamina to object to KBC's selection or for Pertamina to have asserted its right to participate in the first arbitrator's appointment was within thirty days of receiving KBC's Notice of Arbitration and arbitrator selection. In the absence of an objection from Pertamina, nothing in the ESC precluded the ICSID from accepting KBC's nomination for the first arbitrator.[13] This procedure materially complies with the terms of the ESC.[14]

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13. It is noted that Pertamina still lodged no objection to either the first or the second individual appointed arbitrator.

14. There are other viable interpretations of the ESC arbitration clause and the parties' contracts generally that support the procedure used in this dispute. For instance, because the ESC and JOC are expressly integrated contracts, they must be interpreted together to determine the intent of the parties. It is arguable that the parties to the ESC intended to be bound by the arbitration provision (including the provision for the selection of arbitrators) of the JOC when a dispute involved that contract. Under that interpretation, the arbitration provision of the ESC would be operative only in the event the arbitration did not include issues arising under the JOC. Alternatively, the contract provisions may be harmonized by applying the ESC methodology only when KBC and Pertamina both were adverse to PLN and not to each other.

Pertamina's belated arguments that Prof. Bernardini was improperly selected are a futile attempt to avoid consequences of its strategic decisions not to object timely to KBC's selection and to decline to participate in the selection of an arbitrator.

Moreover, there is no evidence—and Pertamina does not even allege—that Prof. Bernardini, the KBC-selected arbitrator, was biased against Pertamina. Indeed, to the extent Pertamina must show prejudice from the contract violation to support this New York Convention defense, Pertamina's evidence fails even if one assumes that Prof. Bernardini unfairly favored KBC in the arbitration. All the findings and awards were unanimous. *See* PX 28, Preliminary Award; PX 71, Final Award. There is no evidence or even any allegation that the other two arbitrators were not neutral, were biased, or had any conflict of interest. Therefore, Pertamina cannot show that the arbitration selection procedure worked any prejudice to Pertamina. *See Compagnie des Bauxites de Guinee*, 1992 WL 122712, at *5.

The Court accordingly holds that Pertamina has not met its burden to show either that the composition of the Tribunal violated the parties' agreements or that the composition caused Pertamina substantial prejudice.

B. ***Alleged Due Process Violations***

The New York Convention allows denial of award confirmation if the party against whom it is invoked can prove that it "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case". 9 U.S.C. § 201, Art. V(1)(b).

This enumerated defense "essentially sanctions the application of the forum state's standards of due process." *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145-46 (2d Cir.1992). The fundamental requirement of due process is the opportunity to be heard at a "meaningful time and in meaningful manner." *Id.* at 146. Enforcement of the award may be denied only if there was a procedural infirmity that rendered the proceedings fundamentally unfair and caused prejudice to the complaining party. *Hammermills*, 1992 WL 122712, at *5. A fundamentally fair hearing is one that meets the minimum requirements of fairness: adequate notice, a hearing on the evidence, and an impartial decision by the arbitrators. *See Generica Ltd. v. Pharm. Basics*, 125 F.3d 1123, 1130 (7th Cir.1997); *Sunshine Mining Co. v. United Steelworkers*, 823 F.2d 1289, 1295 (9th Cir.1987). The right to due process does not, however, encompass the procedural rights guaranteed by the Federal Rules of Civil Procedure. *Imperial Ethiopian Government*, 535 F.2d at 337; *Empresa*, 106 F.Supp.2d at 1026; *Trans Chem.*, 978 F.Supp. at 310 ("The right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure. By agreeing to arbitration [the respondent] subjected itself to its advantages and disadvantages.").

Pertamina argues that it was not afforded due process in the arbitration because the Tribunal (1) failed to grant a continuance and denied it further discovery six weeks before the scheduled hearing, and (2) "reversed," without notification, the Preliminary Award. The first of these alleged procedural deficiencies relates to Pertamina's alleged inability to respond adequately to issues raised in KBC's Rebuttal briefing. In connection with its arguments regarding

discovery, Pertamina further asserts that it is entitled to discovery in this federal court proceeding pursuant to Federal Rule of Civil Procedure 56(f) before the Court rules on KBC's summary judgment motion. The second alleged procedural deficiency relates to Pertamina's perception that the Final Award is contrary to the Tribunal's Preliminary Award, which found that the Government of Indonesia was not a proper party to the arbitration and that Pertamina could not be held liable for the acts of the Government of Indonesia. KBC contends that Pertamina received a full and fundamentally fair hearing.

1. Denial of Request for Continuance and Discovery

Tribunal's Denial of Continuance and Discovery Requests.—Six weeks before the hearing, in early May 2000, KBC filed a Rebuttal with the Tribunal. Pertamina contends that it was prejudiced by KBC's Rebuttal because KBC allegedly included an entirely new position on the financing of the Project, made new allegations of the conduct constituting Pertamina's breach, relied on newly-submitted awards in the arbitrations known as *Himpurna* and *Patuha*, identified additional witnesses, and presented new documentary evidence. Pertamina asserts that it was required to secure new experts and fact witnesses and to impose upon its existing experts and fact witnesses to review KBC's Rebuttal submissions in four weeks. Pertamina further contends it had insufficient time post-Rebuttal to prepare for the hearing.

In fact, KBC's Rebuttal did not assert any new claims or new legal theories for recovery. KBC's Rebuttal responded

to specific defenses asserted in Respondents' Reply by specifying additional facts, argument, and authority supporting its claims, including the *Himpurna* and *Patuha* awards. The Court is aware of no rule or law that obligated KBC to specify in its Revised Statement of Claim all evidence it intended to submit, and every argument it intended to make, ultimately to support its claims at the hearing. Pertamina had notice of KBC's claims, and should have anticipated that KBC would contest its defenses. The arbitration proceeding was pending for approximately two years. Pertamina had ample time to prepare its case. Moreover, the fact that KBC's Rebuttal was submitted only six weeks before the hearing was the direct result of Respondents' requests for extensions of time to submit their Reply to KBC's November 1999 Revised Statement of Claim. Pertamina was aware in mid-March 2000, when the Tribunal granted its latest request for an extension of time, that the hearing date remained set for June 19, 2000. *See* PX 38, Procedural Order No. 4. Pertamina did not file its Reply to KBC's Revised Statement of Claim until April 2000, which explains the timing of KBC's Rebuttal.

To the extent Pertamina also contends that it was unfairly denied discovery on the "highly material" issue of KBC's ability to finance the Project, the record does not support the contention. During the two years preceding the filing of the Rebuttal, Pertamina had requested no discovery on this "highly material" issue, even though KBC expressly sought lost profits in its Revised Statement of Claim in November, 1999, and even though Pertamina responded to KBC's claim by arguing that KBC was entitled to no damages because it could not have completed the Project for reasons independent

of the Presidential Decree. *See* PX 40, at 6. Moreover, even without the requested discovery, Pertamina presented substantial evidence on the Indonesian economy (information easily accessible to Pertamina and PLN), and expert opinions on the availability of financing, on the size of the "geothermal reserve," and on the "useable resource." *See* PX 39, 41, 42, 43, and 44. Pertamina's counsel thoroughly cross-examined KBC's witnesses on the issues raised in KBC's Rebuttal. Pertamina, which bears the burden to prove that the hearing was fundamentally unfair, does not identify specific topics or other matters it was prevented from raising; nor does Pertamina identify anything it would have done differently if it had more preparation time. Pertamina refers to the broad, general discovery requests attached to its letter of submission to the arbitrators, *see* PX 54, but it has not identified a single specific piece or type of evidence it believes exists that would have aided in its defense on these issues. Pertamina has failed to establish under the New York Convention that it was denied a fundamentally fair hearing, and thus denied due process, as a result of the lack of discovery or a continuance after KBC's Rebuttal.[15]

In addition, the transcript of the June 23, 2001 proceedings (the last day of the arbitration hearing) establishes that Respondents informed the Tribunal that they were satisfied with the record as it existed, and that they abandoned their pre-hearing discovery requests:

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15. The issue is not whether this Court would have granted the discovery or the continuance. The question is whether the procedures employed met the minimum requirements of fairness.

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MR. CHAIRMAN: May we, before departing have a discussion on what is going to be done now in these proceedings, and we see two items on this particular agenda. There were first a certain number of procedural objections which have been made before this hearing, and in the procedural order we said that this would be decided after the hearing. In summary, there was a request for discovery from one side, and there was objection to the submission of this arbitral award and the business of confidentiality. You remember this discussion.

MR. MISHKIN [Respondents' Attorney]: I think there was a request for discovery from both sides.

MR. CHAIRMAN: Our first question is are these requests maintained, all of them, part of them, because we would like to know on what we have to decide.

MR. MISHKIN: May I just give you my views on that question.

MR. CHAIRMAN: Yes.

MR. MISHKIN: And that is that the purpose of discovery is to prepare for the hearing, it is not to supplement the record after the hearing. So I think the discovery requests are moot, and if discovery is now permitted, then you have to re-open the proceedings and so on. So I treated, notwithstanding the fact that it was theoretically open, I treated this request as effectively being denied, and we went forward. Our

> request went to the purported financial ability, the purported financing that would have been made available and other things, and *I think the record on that has been fully made. I am prepared to rest on that record*, and so *I think discovery requests should no longer be in the picture.*
>
> MR. SCHILLER [Petitioner's Attorney]: I agree.
>
> PROF. BERNARDINI [Arbitrator]: And you agree on their withdrawing their request. What about yours?
>
> MR. SCHILLER: I withdraw my request.

Hearing Transcript, Vol. V, at 807-08 (emphasis added). Thus, Pertamina expressly abandoned its arguments concerning the timing and other alleged procedural defects in the arbitration proceedings.

In any event, these procedural decisions were well within the reasonable exercise of the Tribunal's discretion. These decisions did not prevent Pertamina from having a meaningful hearing. They do not rise to the level of fundamental unfairness necessary to deny enforcement of the arbitration award.

Pertamina's Rule 56(f) Request for Discovery.— As another avenue in its due process defense under the New York Convention, Pertamina requests discovery in this lawsuit under the Federal Rules of Civil Procedure. Specifically, Pertamina requests, as it did before the Tribunal, additional discovery related to KBC's ability to finance the

Project. KBC opposes Pertamina's request, contending that it is improper under applicable law and the New York Convention, and is unwarranted factually. Pertamina's request for discovery is denied.

Rule 56(f) of the Federal Rules of Civil Procedure permits a district court, upon a proper showing by the party seeking Rule 56(f) relief, to delay consideration of a motion for summary judgment pending additional discovery. FED. R. CIV. P. 56(f); *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1441 (5th Cir.1993). "In order to obtain a continuance of a motion for summary judgment for discovery purposes, a party must set forth some statement to the court indicating why additional discovery is necessary and 'how additional discovery will create a genuine issue of material fact.'" *Canady v. Bossier Parish School Bd.*, 240 F.3d 437, 445 (5th Cir.2001) (citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 28 F.3d 1388, 1395 (5th Cir.1994)). A party "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts." *Krim*, 989 F.2d at 1442 (internal citations omitted). It must show (1) why additional discovery is needed and (2) how that discovery will create a genuine issue of material fact. *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 535 (5th Cir.1999) (citing *Krim*, 989 F.2d at 1442). If the party has not diligently pursued discovery, however, it is not entitled to relief under Rule 56(f). *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 28 F.3d 1388, 1397 (5th Cir.1994).

Pertamina argues that this Court's review of its New York Convention defenses involves legal issues subject to *de novo*

review, but concedes that the Court must defer to the Tribunal's factual findings. Pertamina's Response, at 2. Pertamina also concedes that the grounds for review under the New York Convention typically relate to the existing record and do not otherwise depend on discovery. Pertamina's Response, at 50 (citing *Frere v. Orthofix, Inc.*, Nos. 99 CIV4049 and 00CIV1968, 2000 WL 1789641, at *4-*8 (S.D.N.Y. Dec.6, 2000)). Discovery is particularly inappropriate in enforcement proceedings under the New York Convention. *See Imperial Ethiopian Gov't*, 535 F.2d at 337 ("the loser in arbitration cannot freeze the confirmation proceedings in their tracks and indefinitely postpone judgment by merely requesting discovery.").

As noted above, the right to due process protected by the New York Convention does not encompass the procedural rights guaranteed by the Federal Rules of Civil Procedure. *See Imperial Ethiopian Government*, 535 F.2d at 337; *Empresa*, 106 F.Supp.2d at 1026; *Trans Chem.*, 978 F.Supp. at 310 ("The right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure. By agreeing to arbitration [the respondent] subjected itself to its advantages and disadvantages."). Pertamina had notice at least as early as November 24, 1999, upon KBC's submission of its Revised Claim, that KBC was seeking lost profits.[16] *See* PX 31,

16. In its Notice of Arbitration, KBC claimed it was seeking damages from PLN and Pertamina for breach of both the JOC and ESC. *See* PX 6, Notice of Arbitration, ¶ 17(A). It was apparent at that point that KBC's ESC claim likely would include lost profits, and thus raised the issue of financing, because the ESC contemplated that the Project would be completed and electricity sold to PLN.

Revised Statement, at 37. Indeed, the issue of available financing was raised and thoroughly addressed by Pertamina, without the benefit of any discovery, in its Reply to KBC's Revised Statement, *see* PX 40, Respondents' Reply, at 6, and through witness statements. There is no reason to allow the discovery Pertamina requests at this enforcement stage of the proceedings.

Finally, the Court's conclusion that the requested discovery is unwarranted at this stage is supported by statements of Pertamina's counsel at the conclusion of the arbitration hearing. Counsel stated that "discovery is to prepare for the hearing, it is not to supplement the record after the hearing" and that Pertamina's discovery request "went to the purported financial ability, the purported financing that would have been made available and other things, and I think the record on that has been fully made. I am prepared to rest on that record, and so I think the discovery requests should no longer be in the picture." Hearing Transcript, Vol. V, at 807-08.

Even if discovery were appropriate at this late stage in the parties' dispute, and even if the Tribunal made a factual or legal error, Pertamina has failed to meet its Rule 56(f) burden to demonstrate why the requested discovery is material. This Court may not disturb the Tribunal's ruling absent a due process violation, or other ground under the New York Convention. Pertamina has failed to show that the evidence that could be discovered likely would lead to a finding that the arbitration process was fundamentally unfair, constituted a due process violation for some other reason, or violated the New York Convention in some other way. Thus, Pertamina's discovery request under Rule 56(f) is denied.

In sum, Pertamina has failed to meet its burden to show that circumstances warrant opening the record for additional evidence in this enforcement proceeding. Thus, the Court rejects Pertamina's request for discovery and its argument that KBC's motion for summary judgment is premature.

2. "Reversal" of the Preliminary Award

Pertamina contends that it was denied due process when the Tribunal found it liable for abiding by the requirements of the Presidential Decree despite having determined in the Preliminary Award that a "Government Related Event" is "not deemed to be a breach of contract by Pertamina or PLN but a Force Majeure event excusing KBC's non-performance." PX 28, Preliminary Award, at 19. Further, Pertamina contends that because the Tribunal explicitly stated that the matters to be considered at the hearing on the merits were to be "issues not resolved in this Preliminary Award," it did not have notice that it would be held liable for breach of contract. Pertamina's position misinterprets both the Preliminary Award and the Final Award, and defies logic. The Preliminary Award found that the Government of Indonesia was not a party to the contracts and that Pertamina was not the alter-ego of the Government. However, it expressly recognized that Pertamina *would* bear the risk of loss arising from a Government Related Event:

> [T]he parties took care of the close relation of PERTAMINA and PLN with the [Government]. They included in both contracts a definition of "Government [R]elated Event" and, in both contracts, the Force Majeure clause indicates

> that a "Government [R]elated Event" is an event of Force Majeure with respect to KBC only. This has two consequences for the interpretation of the parties' intention. On the one hand, they were acknowledging that PERTAMINA and PLN had such a close relation with the GOI that a decision of the latter was not a Force Majeure event for them; on the other hand, they were confirming that the [Government] was not a party to the contracts since a governmental decision which prevents KBC to perform its obligations is not deemed to be a breach of contract by PERTAMINA or PLN but a Force Majeure event excusing KBC's non performance.

Id.

In the Final Award, the Tribunal found that Pertamina had a contractual responsibility to make KBC whole for a "Government [R]elated Event," not that the Presidential Decree constituted a breach of contract by Pertamina. The Tribunal stated:

> [The Preliminary Award] was not meant to express any view as to the consequences for PERTAMINA or PLN of a Governmental decision which prevents the performance of the Contracts. Contrary to Respondents' point of view, the fact that they are not responsible for the Governmental decision to prevent the performance of the Contracts does not exempt them from liability if they do not perform their own obligations in abiding by the decision.

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> The Governmental decisions, in this case the Presidential Decrees n. 39/1997 and n. 5/1998, do not amount to a breach of Pertamina's and PLN's obligations. However, since a Governmental event is not a Force Majeure event for them, their non-performance has no legitimate excuse and must be considered as a breach of contract.
>
> Such distinction is far from being artificial, as the Respondents contend. It applies each time a party is actually prevented from performing its contractual obligations by an event which it cannot invoke as Force Majeure due to the existence of provisions to that effect in the contract or by application of the law.

PX 71, Final Award, ¶¶ 56-57.

Moreover, the Preliminary Award must be read in context with the Notice of Arbitration and all subsequent pleadings by claimant KBC and Respondents. KBC clearly and directly sought relief for alleged breaches of contract. In these circumstances, if Pertamina truly thought the Preliminary Award eliminated its liability for non-performance, then there was nothing left to arbitrate. At the very least, Pertamina had ample notice that the Tribunal would be hearing all of the matters addressed in KBC's Revised Statement of Claim, submitted *after* the Preliminary Award and approximately seven months before the hearing on the merits. Pertamina responded to those claims in its briefing to the Tribunal and thus demonstrated its awareness at the time of the matters in

issue. Pertamina's self-serving, erroneous interpretation of the Preliminary Award, does not support a finding that the arbitration was fundamentally unfair. Indeed, Pertamina has failed to demonstrate that the Tribunal's own interpretation of its order is in any way unfounded.

C. *Alleged Violations of Public Policy*

The Convention allows confirmation of an award to be refused if "the recognition or enforcement of the award would be contrary to the public policy of that country." 9 U.S.C. § 201, Art. V(2)(b). Pertamina asserts that the Final Award is contrary to United States public policy because it (1) violates the internationally recognized doctrine of "abuse of rights" by awarding lost profits to KBC; and (2) holds Pertamina liable for refusing to violate governing Indonesian law.

Application of the public policy exception will succeed in only the narrowest of circumstances; indeed, vacating an arbitral award under this defense requires a violation of the "most basic notions of morality and justice." *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 593 (7th Cir.2001) (quoting *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir.1975)); *see also Europcar*, 156 F.3d at 315; *Industrial Risk Ins. v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1445 (11th Cir.1998); *Parsons & Whittemore Overseas, Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir.1974). The award must violate an "explicit public policy that is well-defined and dominant . . . [and is] ascertained by reference to the laws and legal precedents and not from general consideration of supposed public interests." *Industrial Risk Ins.*, 141 F.3d

at 1445 (quoting *Drummond Coal Co. v. United Mine Workers, Dist. 20*, 748 F.2d 1495, 1499 (11th Cir.1984) (internal quotes deleted)).

1. Does The Lost Profits Award Constitutes An "Abuse of Rights"?

The international "abuse of rights" doctrine put forth by Pertamina in its defense of enforcement of the Final Award is akin to America's "good faith" principle of law. Joseph M. Perillo, "*Abuse of Rights, A Pervasive Legal Concept*," 27 PAC. L.J. 37, (Fall 1995). Actions constitute an abuse within the scope of the doctrine if: "(1) the predominant motive for the action is to cause harm; or (2) the exercise of a right is totally unreasonable given the lack of any legitimate interest in the exercise of the right and its exercise harms another; or (3) the right is exercised for a purpose other than that for which it exists." JOHN D. CALAMARI AND JOSEPH M. PERILLO, THE LAW OF CONTRACTS, § 11.39 (4th 1998).

In asserting the "abuse of rights" doctrine, Pertamina does not argue that lost profits are never a legitimate form of damages for breach of contract, but that an award of lost profits in this particular case, when KBC never finished construction on the Project and the Indonesian economy was in ruins, constitutes an abuse of rights in violation of United States public policy.

First, Pertamina falls far short of meeting its burden to show that the "abuse of rights" doctrine is well-defined and dominant inUnited States law. Pertamina has not cited a

single case holding that "abuse of rights" is a recognized doctrine in the United States or applying that doctrine to avoid enforcement of a contractual right. However, even assuming for purposes of the instant motion that "abuse of rights" is an accepted legal doctrine in this country, the facts of this case, as found by the Tribunal, do not meet the elements of an "abuse of rights" as set forth by the authority relied upon by Pertamina. There is no evidence, and thus can be no finding, that KBC's primary motivation was to cause harm to Pertamina or the Indonesian People; that KBC lacks a legitimate interest in asserting its right to lost profits by virtue of its contracts with Pertamina; or that KBC was attempting to exercise its right to recover lost profits for any purpose other than being compensated for its losses caused by Pertamina's failure to perform its obligations under the contracts. The fact that KBC was awarded a substantial sum of money, and Pertamina may think that its resources are better spent elsewhere, does not satisfy the doctrine.

In arguing that the lost profits award constitutes an "abuse of rights," Pertamina cites two arbitration awards that resulted from the same Presidential Decree that precipitated the arbitration in the instant case. *See* Petitioner's Legal Authorities ("LA") 2, Final Award dated May 4, 1999, *Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listruik Negara* ("*Himpurna* "); LA 3, Final Award dated June 11, 1998, *Patuha Power Ltd. v. PT. (Persero) Perusahaan Listruik Negara* ("*Patuha*"). The arbitral tribunal that decided both *Himpurna* and *Patuha* invoked the doctrine of "abuse of rights" to deny the claimants' awards of lost profits. These awards contain extensive discussion of the

"abuse of rights" doctrine. *See* Pertamina's Response, at 60-64. A review of those awards reveals that the tribunal was influenced by PLN's status as "an arm of governmental policy acting in pursuit of the public welfare" that had not intentionally deprived the claimant of valuable contractual rights, and by the dire straits of the Indonesian economy.[17]

The *Himpurna* and *Patuha* Final Awards were introduced into evidence by KBC, over Pertamina's objection.[18] Pertamina contends that despite its objection to those awards, it argued for application of the "abuse of rights" doctrine detailed therein, but the Tribunal ignored the doctrine. *See* Pertamina's Response, at 60. Pertamina's arguments fail for several reasons. First, prior arbitral awards are not precedential authority for the Tribunal or this Court. *See Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 147 (4th Cir.1993).

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17. It is noted that Pertamina's argument to this Court, that the interests of the Indonesian public demand that Pertamina be immune from liability for lost profits, is at odds with the vigorously defended position in the arbitration that Pertamina and PLN are not the alter-egos of the Indonesian Government. In any event, it is possible that the results in *Himpurna* and *Patuha* are attributable, at least in part, to positions taken by PLN in those cases that are materially different from PLN's positions here.

18. Pertamina's reliance on *Himpurna* and *Patuha* is also somewhat disingenuous given its argument to the Tribunal that those decisions should not be treated as precedents. PX 71, Final Award, ¶ 31.

Second, it is clear that the doctrine of "abuse of rights" was before the Tribunal, and was not "ignored."[19] The Final Award indicates that the Tribunal in reaching its conclusion considered the state of the Indonesian economy and balanced the harm to Pertamina and PLN against KBC's legitimate interest in enforcing its contractual rights. The Tribunal noted that "the worsening of the economic and political situation in Indonesia at the time has to be taken into account as regards both the conditions at which financing could have been obtained and possible delays in arranging the same." PX 71, Final Award, ¶ 133. The Tribunal further noted, "[t]here is no doubt . . . that the Claimant is entitled to obtain the benefit of its bargain in addition to recovering the expenditures it has incurred. As stated in the *Himpurna* award, '[t]o limit the recovery of the victim of a breach to its actual expenditures is to transform it into a lender, which is commercially intolerable when the party was at full risk for the amount of investments made on the strength of the contract.'" *Id.*, ¶ 122. Thus, by awarding KBC its lost profits, the Tribunal necessarily rejected the "abuse of rights" doctrine in light of the facts and arguments presented.

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19. In any event, it is likely that disregard of a principle of law is not a valid basis for avoiding confirmation under the Convention. *See M & C Corp.*, 87 F.3d at 851 n. 2 ("Whatever may be meant by the manifest disregard doctrine applicable in domestic arbitration cases, it is clear that such a doctrine does not rise to the level of a violation of public policy that is necessary to deny confirmation of a foreign arbitral award."); *RAKTA*, 508 F.2d at 977 ("Both the legislative history of Art. V and the statute enacted to implement the United States' accession to the Convention, are strong authority for treating as exclusive the bases set forth in the convention for vacating an award.").

This Court sees no reason to revisit the merits of the Tribunal's factual findings or its Final Award in this regard. The Court concludes that Pertamina has not met its burden to establish that the award to KBC of lost profits violates public policy.

2. Does the Final Award Hold Pertamina Liable For "Obeying The Law"

Pertamina lastly contends that the Tribunal held it liable for refusing to violate governing Indonesian law. As discussed *supra* in Section IV.B.2, at 953 – 54, this contention mischaracterizes the Final Award. The Tribunal did not find Pertamina liable for refusing to break the law.[20] Rather, in the Final Award, consistent with the Preliminary Award, the Tribunal found that Pertamina had a contractual responsibility to make KBC whole for a "Government [R]elated Event." The Tribunal thus found Pertamina liable for damages based on the parties' express contractual allocation of the risk of loss. As the Tribunal pointed out, the risk of loss was rational based on Pertamina's close relationship with the Indonesian Government.

Pertamina accordingly has not satisfied its burden to show that the Final Award offends the "most basic notions of morality and justice." Enforcement of the Final Award is not contrary to United States public policy.

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20. Nor did the Tribunal hold that the Presidential Decree constituted a breach of contract by Pertamina, as Pertamina has argued elsewhere.

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V. *CONCLUSION AND ORDER*

Pertamina did not waive its right to assert the defenses established by the New York Convention in this case, but has failed to meet its burden of proof on any of its asserted defenses under the New York Convention. The Court finds that the arbitration was not contrary to the contractual agreements of the parties; Pertamina was not denied due process in connection with the arbitration proceeding; and the Final Award does not violate United States public policy. In addition, the Court concludes that Pertamina's request to be allowed to conduct discovery in this enforcement proceeding is without merit. It is therefore

ORDERED that KBC's Motion for Summary Judgment Confirming Arbitral Award [Doc. # 14] is **GRANTED.**

The Court will issue a separate Final Judgment.

FINAL JUDGMENT

In accordance with the Memorandum and Order issued this date, it is hereby

ORDERED that Petitioner Karaha Bodas Company, L.L.C.'s ("KBC's") Motion for Summary Judgment is **GRANTED.** It is further

ORDERED that the Final Award in the Arbitration dated December 18, 2000 is **CONFIRMED**. Therefore, in accordance with the Final Award, KBC shall recover from Pertamina:

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(1) $111,100,000.00 for lost expenditures, plus interest at the rate of 4% per annum from January 1, 2001 until the date of full payment;

(2) $150,000,000 for lost profits, plus interest at the rate of 4% per annum from January 1, 2001 until the date of full payment;

(3) $66,654.92 for costs and expenses of the arbitration, plus interest at the rate of 4% per annum from January 1, 2001 until full payment.

Each party shall pay its own costs incurred in this proceeding.

APPENDIX C — TEMPORARY RESTRAINING ORDER AND ORDER OF CONTEMPT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, DATED APRIL 9, 2002 AND ENTERED APRIL 11, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H 01-0634

IN THE MATTER OF AN
ARBITRATION BETWEEN

KARAHA BODAS COMPANY, L.L.C.,

Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,

Respondent.

TEMPORARY RESTRAINING ORDER
AND
ORDER OF CONTEMPT

KBC sought a Temporary Restraining Order [Doc. # 88] to enjoin Pertamina from proceeding with an action commenced in the District Court of the Central District of Jakarta, Indonesia, to set aside an Arbitral Award dated

December 18, 2000, made in Switzerland. This United States District Court for the Southern District of Texas has held the Arbitral Award to be enforceable under the Convention on Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") in a Memorandum and Order, entered December 4, 2001, upon a declaratory judgment complaint and summary judgment motion filed by KBC, after notice and full briefing by both parties. The Judgment in this case has become final and is on appeal before the United States Court of Appeals for the Fifth Circuit.

Based on findings of fact and conclusions of law stated orally on the record at the hearing on March 29, 2002, as supplemented at a hearing on April 2, 2002, the Court issued orally a Temporary Restraining Order. A copy of transcripts of each of Court's oral orders was provided to the parties on March 30, 2002, and April 3, 2002, respectively. This Temporary Restraining Order, set forth below, is a formal writing containing the Court's prior rulings. This is not the Court's ruling on the Motion for Preliminary injunction that remains pending before the Court.

The Court held a hearing on April 2, 2002, on KBC's Motion for Contempt [Doc. # 97], because the Indonesian Court issued on April 1, 2002, an injunction purporting to prevent KBC from taking any steps, world-wide, to enforce or execute on the Judgment entered in this case. Pertamina had not informed the Indonesian Court that this Court had issued an injunction effective March 29, 2002, as set forth in the following Temporary Restraining Order.

Appendix C

TEMPORARY RESTRAINING ORDER

Based on the findings and conclusions set forth on the record on March 29, 2002, it is hereby (and previously)

ORDERED, as stated orally on the record on March 29, 2002 and effective that date, that Petitioner's Motion for a Temporary Restraining Order is **GRANTED in part**. Specifically, it is

ORDERED that, during the pendency of this Temporary Restraining Order, Pertamina shall withdraw its application for injunctive relief against KBC in the District Court of the Central District of Jakarta, Indonesia. It is further

ORDERED that, to effectuate the foregoing, Pertamina shall amend its Complaint filed in the District Court of the Central District of Jakarta, Indonesia, to specifically and explicitly withdraw Pertamina's request for injunctive relief against KBC, and shall withdraw its request for penalties associated with any injunction issued by that Court. It is further

ORDERED that Pertamina affirmatively shall request that the Distract Court of the Central District for Jakarta, Indonesia, not issue any injunctive relief. It is further

ORDERED that Pertamina shall explain to the District Court of the Central District of Jakarta, Indonesia, that the United States District Court for the Southern District of Texas is to be permitted adequate time to complete the assessment of the legal right of Pertamina under Article VI of the New

York Convention to proceed in the courts of Indonesia, in light this Court's final Judgment declaring the Arbitral Award issued on December 18, 2000, fully enforceable. It is further

ORDERED that Pertamina is enjoined from seeking from the District Court of the Central District of Jakarta, Indonesia, expedited relief to set aside the December 4, 2000 Arbitral Award. Pertamina is not at this time required to withdraw its Complaint filed under Article V of the New York Convention in the District Court of the Central District of Jakarta, Indonesia, but is directed to proceed with filings in this action to perform ministerial actions only. It is further

ORDERED that Pertamina shall arrange for the preparation of a transcript of the April 1, 2002 hearing before the District Court of the Central District of Jakarta, Indonesia. KBC and Pertamina shall each pay one-half of the cost of the transcript. It is further

ORDERED that during the pendency of this TRO, until the issue of the Preliminary Injunction is determined by this Court, KBC shall not seek in courts of Canada, Hong Kong, Singapore, or any other jurisdiction outside the United States, expedited relief, *ex parte* relief, or other relief to execute upon Pertamina's assets located in Canada, Hong Kong, Singapore, or any other jurisdiction outside the United States. This is not an injunction preventing KBC from seeking execution upon assets of Pertamina in jurisdictions within the United States on notice to Pertamina. It is further

ORDERED that KBC shall post a bond of $1,000,000, in support of this Temporary Restraining Order. As stated on

the record on March 29, 2002, this bond was to be posted on or before April 1, 2002.

ORDER OF CONTEMPT

Based on the Court's findings of fact and conclusions of law as stated orally in connection with KBC's Motion for Contempt [Doc. #97], at the hearing on April 2, 2002, it is hereby

ORDERED that Pertamina is in civil contempt of the Temporary Restraining Order issued by the Court on March 29, 2002, reflected in the transcript of the March 29, 2002 ruling (delivered to Pertamina's counsel on March 30, 2002), and reaffirmed above. The Temporary Restraining Order was clear and precise. There is no question, as evidenced by the record, that Pertamina had notice of the Court's injunction issued March 29, 2002, and that Pertamina knowingly did not comply with the Order. It is further

ORDERED that, effective April 2, 2002, Pertamina must direct its counsel to withdraw immediately its application for injunctive relief against KBC in the District Court of the Central District of Jakarta, Indonesia. It is further

ORDERED that Pertamina shall request immediately that the Central District and any appropriate Appellate Court vacate the injunctive relief ordered by the Jakarta, Indonesia District Court on April 1, 2002. It is further

ORDERED that, in order to protect the *status quo* between the parties as if the Indonesian injunction had never

existed, Pertamina shall indemnify KBC for all monetary punishments or penalties imposed under the injunction issued by the District Court for the Central District of Jakarta, Indonesia, as a result of any action taken by KBC between March 29, 2002 and this Court's final ruling on KBC's Motion for Preliminary Injunction [Doc. # 111] seeking to preclude Pertamina from proceeding with the Indonesian litigation. It is further

ORDERED that Pertamina will not recover, at any time, any monies as a result of the injunction issued on April 1, 2002, by the District Court for the Central District of Jakarta, Indonesia, or as a result of any appeals therefrom, or as a result of any similar injunctions issued in favor of Pertamina by an Indonesian Court. KBC has no obligation to pay any penalties arising from such order, to the extent such monies are imposed as a penalty for any actions taken by KBC between March 29, 2002 and this Court's final ruling on KBC's Motion for Preliminary Injunction. It is further

ORDERED that, if any order is issued by any court against KBC to pay penalties arising from the injunction order of the District Court for the Central District of Jakarta based on any action taken by KBC between March 29, 2002 and this Court's final ruling on KBC's Motion for Preliminary Injunction, Pertamina must pay KBC such monies prior to KBC having any obligation to pay to Pertamina such amounts. It is further

ORDERED that Pertamina retains all its defenses to enforcement of the Arbitral Award and execution against its or others' assets, and may defend against KBC's enforcement

of the Award and against enforcement of the Judgment of this Court, or against KBC's execution upon its or others' assets, in all jurisdictions. It is further

ORDERED that the injunction entered against KBC by the District Court for the Central District of Jakarta shall not bar KBC from pursuing its enforcement actions anywhere in the world if this Temporary Restraining Order is dissolved and not converted to a comparable or similar Preliminary Injunction. It is further

ORDERED that the letter of the President Director of Pertamina dated April 1, 2002 as interpreted by the Court at the April 2, 2002 hearing shall be treated as a judicial admission on which this Court and KBC may rely. It is further

ORDERED that, because of the hardship to the parties that may result from enforcement of the Indonesian injunction before this Court has an opportunity to make a final ruling on the Preliminary Injunction, good cause exists to extend this Temporary Restraining Order for ten days from the date of this Order.

The Clerk will file and record this Temporary Restraining Order with copies to all parties.

SIGNED at Houston, Texas, at 5:30 p.m. on this 9th day of April, 2002.

s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER GRANTING PRELIMINARY INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, DATED AND FILED APRIL 26, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H 01-0634

IN THE MATTER OF AN
ARBITRATION BETWEEN

KARAHA BODAS COMPANY, L.L.C.,

Petitioner,

v.

PERUSAHAAN PERTAMBANGAN
MINYAK DAN GAS BUMI NEGARA,

Respondent.

ORDER GRANTING PRELIMINARY INJUNCTION

This case, in which a final judgment confirming an arbitral award in favor of Karaha Bodas Company, L.L.C. ("KBC") against Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") was entered on December 4, 2001, is before the Court on KBC's Motion for Preliminary

Injunction.[1] The Motion has been briefed and is ripe for determination.[2] Both parties represented to the Court that no evidentiary hearing on KBC's Motion for Preliminary Injunction was necessary. Having considered the parties' submissions, argument of counsel at hearings on March 29, 2002 and April 2, 2002, all matters of record, and applicable legal authorities, the Court concludes that KBC's Motion for Preliminary Injunction should be **granted**.

1. PROCEDURAL BACKGROUND

An international arbitral tribunal made an award of over $261,000,000, plus interest, in damages in favor of KBC

1. The Court issued a Temporary Restraining Order orally on the record at a hearing on March 29, 2002 and issued a Temporary Restraining order and Order of Contempt orally on the record at a hearing April 2, 2002. The Court's oral orders were memorialized in a Temporary Restraining Order and Order of Contempt issued April 9, 2002 [Doc. # 129], as extended by Order issued April 17, 2002 [Doc. # 132].

2. KBC filed an Application for Temporary Restraining Order [Doc. # 88] and Memorandum in Support of Application for Temporary Restraining Order ("KBC's Memorandum of Law") [Doc. # 90], followed by its Memorandum in Support of its Motion for Preliminary Injunction [Doc. # 111] and KBC's Reply Memorandum in Support of its Motion for a Preliminary Injunction [Doc. # 128]. Pertamina filed Pertamina's Memorandum of Law in Opposition to Petitioner's Motion for a Restraining Order and in Support of its Right to Seek Annulment of the Arbitral Award in Indonesia ("Pertamina's Memorandum in Opposition") [Doc. # 115] and Pertamina's Reply Memorandum of Law in Opposition to Petitioner's Motion for a Restraining Order and in Support of its Right to Seek Annulment of the Arbitral Award in Indonesia [Doc. # 127].

against Pertamina in Geneva, Switzerland, on December 18, 2000 (the "Arbitral Award"). The arbitration arose from a commercial dispute over the construction and operation of a power plant in West Java, Indonesia. Pertamina acknowledges that all post-arbitration proceedings are governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). As contemplated by the New York Convention, Pertamina appealed the Arbitral Award to the Swiss Supreme Court. The Swiss court declined to hear Pertamina's appeal due to a procedural error in paying the appeal costs. In August 2001, the Swiss court rejected Pertamina's request for reconsideration and the Swiss Court's dismissal of the appeal became final.

Meanwhile, in February 2001, KBC filed this case seeking confirmation of the Arbitral Award pursuant to Article V of the New York Convention. This Court entered a final judgment (the "Judgment") confirming the Arbitral Award on December 4, 2001. Pertamina appealed the Judgment to the Fifth Circuit, but has not filed a supersedeas bond or otherwise acted to stay the Judgment's execution. The appeal is still pending.

KBC actively is pursuing execution on the Judgment by registering it in other states and seeking writs of execution, garnishment, and turnover of assets KBC believes are owned by Pertamina. These proceedings are being conducted according to the local laws and practices of the states in which the assets are located. KBC also is seeking enforcement in Canada, Hong Kong, and Singapore of the Arbitral Award in original proceedings commenced under Article V of the New York Convention.

Appendix D

In March 2002, about fifteen months after entry of this Court's Judgment enforcing the Arbitral Award and seven months after the Swiss Supreme Court dismissed Pertamina's appeal, Pertamina filed suit in the District Court of Central Jakarta, Indonesia, seeking an injunction and penalties against KBC to prevent it from enforcing the Arbitral Award and seeking to annul the Arbitral Award (the "Indonesian Action").

KBC filed an emergency request in this Court for a temporary restraining order to prevent Pertamina's Indonesian Action from proceeding and to prevent entry of an injunction against it at a hearing scheduled for April 1, 2002 in Indonesia. The Court held a hearing on March 29, 2002, at which both parties argued their respective positions at length. This Court issued a limited temporary restraining order directing Pertamina to withdraw its request for injunctive relief against KBC at or prior to the hearing scheduled for April 1, 2002, in the Indonesian Action. This temporary restraining order was issued in order to preserve the integrity of the Court's Judgment, which had become final and was on appeal without bond, and to maintain the parties' positions prior to Pertamina's commencement of the Indonesian Action. The Court needed additional time to determine the merits of Pertamina's position that it had the right to proceed with its annulment action. So as not to prejudice Pertamina's rights, the Court did not grant KBC's request to order Pertamina to dismiss the Indonesian Action. Also, to protect Pertamina's interests in being able to defend against proceedings initiated by KBC to enforce the Arbitral Award or to execute on the Judgment, KBC was ordered not to seek *ex parte* or emergency relief from any court. The

Court made it clear that the parties were permitted to make any and all arguments they saw fit in enforcement or execution proceedings on notice to the opponent. The temporary restraining order was narrowly tailored to protect the *status quo* that existed prior to Pertamina seeking entry of the Indonesian Injunction without interfering with the jurisdiction of other courts. By its terms, the temporary restraining order was to last only until a ruling could be made on the pending motion for a preliminary injunction after full briefing.

Despite receiving actual notice of this Court's March 29 Order, Pertamina did not withdraw its injunction request in the Indonesian Action. The Indonesian court on April 1, 2002, issued an injunction with draconian enforcement penalties against KBC (the "Indonesian Injunction").[3] KBC complained, and at a hearing on April 2, 2002, this Court found Pertamina in contempt of the March 29, 2002 restraining order, again ordered Pertamina to withdraw its

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3. The Indonesian Injunction prohibits KBC from taking any action to enforce:

> [t]he arbitral award rendered in Geneva, Switzerland, on 18 December 2000 (P-1), arising from Joint Operating Contract/JOC; and Energy Sales Contract/ESC, upon the condition that KBC is imposed with the obligation to pay enforcement money in the amount of US $500,000.00 for each day this order is contravened, which amount must be paid promptly and fully to the Pertamina.

Exhibit 3 to Petitioner Karaha Bodas Company, L.L.C.'s Motion for Contempt.

request in Indonesia for injunctive relief against KBC, and ordered Pertamina to indemnify KBC for any penalties imposed pursuant to the Indonesian Injunction for conduct by KBC that takes place while KBC's Motion for Preliminary Injunction is pending. As the Court explained on April 2 and in its written injunction, Pertamina's pursuit in Indonesian courts of a broad injunction, and "enforcement penalties" for violation of that injunction, impinges on this Court's Judgment and upon KBC's legitimate efforts to enforce its rights thereunder.

Pertamina has sent a transcript of the hearings in this Court to the Indonesian court and has sent a letter notifying the Indonesian court that this Court has ordered Pertamina to file an application for the withdrawal of the Indonesian Injunction.[4] To date Pertamina has not filed a formal application withdrawing its injunction request nor made any commitment to the Indonesian court not to enforce the Injunction. Pertamina has committed through a letter from its President Director and C.E.O. that it will not seek to enforce the Indonesian Injunction against KBC for KBC's actions within the United States.

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4. Pertamina has filed a Motion to Purge Contempt and to Alter or Amend the Adjudication holding Pertamina in Contempt [Doc. # 131]. Pertamina contends that its letter to the Indonesian court satisfies the Court's Temporary Restraining Order. Pertamina further contends that it should be purged of contempt because the oral TRO issued March 29, 2002, on which the contempt was based, was defective and, given the time difference involved, compliance was impossible. Pertamina's Motion to Purge Contempt is **denied**. However, the Court notes that the April 9, 2002 Temporary Restraining Order and Order of Contempt is superseded by this Preliminary Injunction Order.

Appendix D

II. KBC'S MOTION FOR PRELIMINARY INJUNCTION

KBC's Motion for Preliminary Injunction has two parts. First, it seeks an injunction prohibiting Pertamina from seeking (a) to enjoin KBC's attempts to execute on this Court's December 4, 2001 Judgment and (b) to take steps to enforce the December 18, 2000 Arbitral Award in the United States or in other jurisdictions. Second, KBC seeks an anti-suit injunction prohibiting Pertamina from pursuing its annulment action in Indonesia altogether.

Pertamina contends that this Court cannot enjoin the Indonesian action because Indonesia is the only court with jurisdiction to consider Pertamina's claim for annulment of the Arbitral Award.

Traditionally, a plaintiff seeking a preliminary injunction must show the following four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that it will suffer irreparable injury absent the injunction; (3) that the threatened injury outweighs any harm the injunction might cause the defendants; and (4) that the injunction will not impair the public interest. *Enrique Bernat F., S.A. v. Guadalajara, Inc.*, 210 F.3d 439, 442 (5th Cir. 2000) (citing *Sugar Busters, L.L.C. v. Brennan*, 177 F.3d 258, 265 (5th Cir. 1999)). In addition, it is well-established in the Fifth Circuit that federal courts have the power to enjoin foreign suits by persons subject to their jurisdiction. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626 (5th Cir. 1996); *see also Bethell v. Peace*, 441 F.2d 495, 498 (5th Cir. 1971); *accord Laker Airways Ltd. v. Sabena Belgian World Airlines*,

731 F.2d 909, 926 (D.C. Cir. 1984). There is no dispute that this Court has jurisdiction over Pertamina.

In setting the standard for issuance of an anti-suit injunction, the Fifth Circuit has emphasized the need to prevent vexatious or oppressive litigation, and has concluded that "a district court does not abuse its discretion by issuing an anti-suit injunction when it has determined that allowing simultaneous prosecution or the same action in a foreign forum thousands of miles away would result in 'inequitable hardship' and 'tend to frustrate and delay the speedy and efficient determination of the cause.'" *Kaepa*, 76 F.3d at 627. The Fifth Circuit has declined "to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action." *Id.*

In this case, there is a Judgment issued by this Court after extensive and detailed litigation. The Judgment has long been final in the District Court and has been appealed by Pertamina to the Fifth Circuit The Judgment enforces the Arbitral Award. Until two weeks ago, after this Court issued its temporary restraining order, Pertamina did not seek a stay of the Judgment. Pertamina has never filed, nor offered to file, any bond to prevent KBC's execution or enforcement efforts. KBC contends this Court's Judgment and KBC's ability to seek enforcement of it are threatened by Pertamina's new Indonesian proceeding. After a judgment on the merits, there is less need for concern about interfering with a foreign court's jurisdiction and "a court may freely protect the integrity of judgments by preventing their evasion through vexatious or oppressive relitigation." *Laker Airways*, 731 F.2d at 928.

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To the extent that it is necessary for KBC to meet the traditional requirements for a preliminary injunction in addition to meeting the standard articulated in *Kaepa*, the Court finds KBC has done so with respect to both aspects of its preliminary injunction request. First, KBC has shown a substantial likelihood of success on the merits. As explained further below, the Indonesian court is not the proper forum for Pertamina's annulment action. Pertamina raises the same issues in Indonesia that this Court has already ruled upon in KBC's favor. Second, absent a preliminary injunction, KBC will suffer irreparable harm; KBC will be forced to relitigate in a foreign forum issues it has already fully litigated and won in this Court. Further, KBC is justified in assuming that forum will be biased against it, rendering the current Judgment meaningless. Third, the balance of harm weighs in favor of granting a preliminary injunction. The Indonesian Injunction and Indonesian Action pose draconian penalties threatening KBC's ability to collect on the Judgment of this Court both in the United States and abroad, Indeed, at Pertamina's request the Injunction was issued without any meaningful due process afforded to KBC. On the other hand, Pertamina is permitted to assert any and all arguments in its favor in courts where KBC seeks to enforce or execute on assets on the basis of this Court's judgment.

Although the Court has been careful not to undermine international comity, the Court is not required to give absolute deference to proceedings in a foreign court filed without viable legal authority, especially when a final judgment on the matter has already been entered. In this case, a preliminary injunction of this Court does not impinge on another court's jurisdiction or cause comity concerns. It is the late-filed

Indonesian Action that potentially interferes with this Court's jurisdiction, not vice versa. Moreover, as explained hereafter, the Indonesian court does not have jurisdiction under the New York Convention over Pertamina's claims. Thus, the preliminary injunction KBC seeks is consistent with the standards expressed by the Fifth Circuit in *Kaepa* and is not contrary to public policy.

These elements and the ways in which the-Indonesian Injunction and the Indonesian Action threaten this Court's jurisdiction and KBC's rights are discussed in detail below.

1. The Indonesian Injunction

KBC argues that the injunction sought and obtained by Pertamina in Indonesia is an attack on this Court's jurisdiction and interferes with this Court's inherent authority to enforce its judgments. KBC contends that this effect flows both from the fact that the Indonesian Injunction prevents KBC from seeking enforcement of the Judgment enforcing the Arbitral Award in the United States, and because it prevents KBC from seeking enforcement of the Arbitral Award in other countries under the New York Convention and through other local means.

Pertamina's briefs do not address the injunction aspect of its Indonesian Action except with the following oblique statement: "The only aspect of the Indonesian annulment proceeding that even raised this prospect [of interference] was to the extent [Pertamina] sought an injunction against enforcement of the [arbitral] Award that might apply in the United States, which this Court's March 29 order and now Pertamina's commitment not to pursue or enforce such relief." Pertamina's Memorandum in Opposition, at 13. The

Court interprets this statement as Pertamina's continued commitment to this Court that Pertamina will not take steps to enforce the Indonesia Injunction against KBC as to actions KBC might undertake in the United States. It is unclear what Pertamina's position is as to the Indonesian Court's *sua sponte* deeming KBC's actions within the United States a violation of its injunction. As to steps KBC might take to enforce the Arbitral Award outside of the United States under the New York Convention or otherwise, the Court construes Pertamina's position to be that the Indonesian Injunction does not interfere with this Court's jurisdiction, that this Court's restraining order is invalid or ineffective outside the United States, and that Pertamina is not in contempt for any violation of that order.

The Court at the March 29 (and April 2) hearing raised the issue of whether *res judicata* bars Pertamina's Indonesian Action and whether the Indonesian Action is simply an end-run around the Judgment and appeal here. Pertamina has declined this Court's invitation to submit briefing on the *res judicata* effect of this Court's Judgment in foreign jurisdictions where KBC seeks enforcement. KBC has presented affidavits supporting its contention that the courts and laws of Canada, Hong Kong, and Singapore would apply *res judicata* or analogous principles to give effect to this Court's Judgment is making their own enforcement determinations.[5] Pertamina has submitted nothing to

5. *See* Declaration of Douglas Alexander Bodner, Exhibit 1 to KBC's Memorandum of Law (Canada); Declaration of Russell Coleman, Exhibit 2 to KBC's Memorandum of Law (Hong Kong); Declaration of Nandakumar Ponniya, Exhibit 3 to KBC's Memorandum of Law (Singapore).

contradict KBC's evidence as to the extraterritorial effect of this Court's Final Judgment.

Moreover, Pertamina has presented no authority to support the legitimacy of the Indonesian Injunction in light of the completion of the enforcement proceeding here pursuant to Article V of the New York Convention. Pertamina has cited, and the Court has found, no authority under the New York Convention (which Pertamina concedes contains the exclusive procedure for recognition and enforcement of foreign arbitral awards by its signatories, including Indonesia) for a court in which an action to annul an award is pending to enjoin enforcement proceedings or a party's post judgment enforcement efforts in another jurisdiction. Instead, the New York Convention contemplates that, under appropriate circumstances, a court in which enforcement is sought may stay the enforcement proceeding pending the annulment action.[6]

The Court concludes that unless and until this Court's Judgment is vacated or stayed by the Court of Appeals for

6. Article VI of the New York Convention provides: "If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V(1)(e), the authority before which the award is sought to be relied upon **may**, if it considers it proper, adjourn the decision of the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security." (Emphasis added.) In connection with its response to KBC's pending application for turnover, Pertamina filed a cross-motion to stay enforcement proceedings until the Indonesian court has ruled (Doc. # 101]. Pertamina's cross-motion, filed April 1, 2001, has only recently become ripe and will be addressed in a separate order.

the Fifth Circuit, KBC has ever right to rely on this Court's Judgment in its enforcement actions in other countries. The Indonesian Injunction against enforcement of the Arbitral Award is a patent attempt to interfere with the Court's Judgment against and deprives KBC of enjoyment of the Judgment's purpose and effect under United States law and the New York Convention. Therefore, The Court concludes that KBC's request for a preliminary injunction restraining Pertamina from enforcing the Indonesian Injunction has merit and will be granted. The Court also concludes that the indemnification provision of the temporary restraining order is fully justified and necessary. The indemnification provisions will be included in a preliminary injunction, until and unless Pertamina withdraws its request for an injunction and the present injunction is vacated by the Indonesian court.

2. The Indonesian Action

KBC contends that no proceeding under the New York Convention may be maintained in Indonesia because Indonesia is neither the place of arbitration nor the place in which enforcement is sought. Pertamina argues that the Indonesian court has jurisdiction over its annulment proceeding pursuant to Articles V(1)(e) and VI of the New York Convention, and that this Court, as an enforcing court, cannot enjoin the annulment proceeding. Article V(I)(e) provides that recognition and enforcement of an award "may be refused" if "[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made." Pertamina concedes that the phrase "under the law of which" in Article V(1)(e) refers

to the arbitral law under which the award was made, not the substantive law that applied to the merits of the dispute.[7] Because of the distinction under the New York Convention between the proper forum for enforcement of an arbitral award versus the forum for annulment of an arbitral award, Pertamina nevertheless contends that the Indonesian Action in no way interferes with this Court's jurisdiction.

Pertamina insists that this Court lacks jurisdiction under the New York Convention to enjoin the Indonesian Action. Pertamina misconstrues the source of this Court's injunction jurisdiction. The Court is not attempting to usurp the annulment jurisdiction that is bestowed upon the "country of origin" under the New York Convention. Instead, the Court's injunction is based on its inherent power to protect

7. *See* Pertamina's Memorandum of Law, at 3 ("Under Indonesian law and as envisaged by the New York Convention, Pertamina is authorized to seek annulment of the Award in Indonesia because the Award is governed by the arbitration law of Indonesia."); Expert Report of Albert Jan van den Berg, Exhibit B to Pertamina's Memorandum of Law, ¶ 7 ("In most cases, the country of origin is the country where the place of arbitration is located and the arbitral award is made. That corresponds to the territorial concept of international arbitration, according to which the place of arbitration determines the applicable arbitration law (which law is to be distinguished from the law applicable to the merits)."); *id.* ¶ 19 ("when parties agree on a governing arbitration law that is different than that of the arbitral locale, the country whose arbitration law was chosen by the parties to govern the proceedings is the proper jurisdiction for bringing an annulment proceeding."); *see also Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F3d 15, 21(2d Cir. 1997) ("only the state under whose **procedural** law the arbitration was conducted has jurisdiction under Art. V(1)(e) to vacate the award." (Emphasis added)).

its own jurisdiction, as clearly established by Fifth Circuit authority. *Kaepa*, 76 F.3d at 627. The Court has jurisdiction over Pertamina and thus has jurisdiction to enjoin Pertamina's actions in a foreign country to the extent those actions interfere with the jurisdiction of this Court or the effect and scope of its orders. *Id.*

The Court finds that KBC has met its burden to show that an anti-suit injunction is appropriate in this case. Pertamina's assertion that the annulment proceeding is not an attack on this Court's jurisdiction and Judgment is disingenuous. Pertamina has admitted that if it is successful in the Indonesian Action, it intends to invoke Article V(1)(e) in support of a motion to this Court to vacate the Judgment confirming the Arbitral Award.[8] In fact, Pertamina clearly seeks to circumvent this Court's rulings by belatedly relitigating the validity of the Arbitral Award in a presumably more sympathetic forum. The Court recognizes that, as an enforcing court, its review of the Arbitral Award was limited to the defenses listed in Article VI of the New York Convention, whereas a court of competent authority with

8. Pertamina's plan is complicated by the fact that this Court lacks jurisdiction to issue the relief Pertamina seeks, since the Judgment has been final for months and Pertamina has appealed the matter. Pertamina would have to seek relief in the Fifth Circuit. Moreover, this Court would not be obligated to give effect to an Indonesian judgment annulling the Arbitral Award. *See In re Chromalloy Aeroservices*, 939 F. Supp. 907, 911-13 (refusing to give *res judicata* effect to an Egyptian judgment annulling an otherwise valid arbitration award made in Egypt). Based on the information currently presented, the Court questions how much weight an Indonesian annulment judgment would be entitled to in a proceeding to vacate the Judgment.

jurisdiction to set aside the Arbitral Award is not so limited. *See Yusuf*, 126 F.3d at 21 (a motion to set aside an international arbitral award is controlled by the domestic law of the rendering state). Nevertheless, in this case, virtually all Pertamina's asserted grounds for annulling the Arbitral Award were litigated fully before this Court. Pertamina states:

> Pertamina's application to annul the award is based *inter alia*, on the following grounds: (1) in rendering the Award, the Tribunal exceeded the power conferred on it by the applicable arbitration agreements by disregarding the parties' express choice of Indonesian law, in violation of both the parties' agreements and the applicable UNCITAL Arbitration Rules; (2) the Tribunal improperly consolidated the two proceedings into a single arbitration, also in violation of both parties' agreements and the applicable UNCITRAL Arbitration Rules; (3) the Tribunal improperly forced Pertamina to share the choice of an arbitrator with the Government of Indonesia and with PLN, in violation of the express procedure laid out by the parties' agreements; and (4) the Award contravenes the public policy of the Republic of Indonesia because it held Pertamina (and PLN) liable for its (their) compliance with Indonesian law. Neither grounds (1) nor (4) had been rased before this Court in the enforcement proceedings.

Pertamina's Memorandum in Opposition, at 3-4. This argument is belied by the record in the present case. Pertamina

expressly argued before this Court that the Arbitral Tribunal failed to consider Indonesian law. *See* Respondent Pertamina's Memorandum in Opposition to KBC's Motion for Summary Judgment [Doc. #29], at 67 ("Not only is such a result fundamentally unfair and contrary to public policy, but it makes no sense under the contracts or Indonesian law. As a matter of Indonesian law, the Tribunal's determination to award damages is in conflict with its factual determination that the parties were prevented from performing by an action that neither party caused – specifically, Presidential Decree No. 5/1988."); *id.* at 71 ("there is no basis under the contracts or Indonesian law for the award of damages"); *see also* Respondent Pertamina's Sur-Reply Memorandum in Opposition to KBC's Motion for Summary Judgment [Doc. # 42], at 26 ("[KBC] ignores (as did the tribunal) that it [secured contractual benefits from Pertamina] in return for and in the context of the application of Indonesian law. As Pertamina's Indonesian law expert Didi Dermawan established, the clauses in the JOC and ESC did not shift the risk of a Government Related Event to Respondents as KBC seeks to do, as a matter of Indonesian law . . . In reaching a different conclusion, the tribunal did not purport to resolve disagreements between experts on the interpretation of Indonesian law. . . . Nor did the tribunal purport to explain how and why the JOC or ESC should be construed as modifying Indonesian law. To the contrary, the tribunal did not refer at all to Indonesian law, but instead reasoned from abstract legal propositions that were not founded on Indonesian law.").

In addition, this Court expressly ruled that the Arbitral Tribunal did not find Pertamina liable for its compliance with

Indonesian law. Although the issue before this Court arose, in part, in the context of the application of United States' public policy, this finding would be equally applicable to an argument regarding Indonesian public policy. Moreover, Pertamina in effect argued that the award also violated Indonesian public policy in connection with its "abuse of rights" defense. Respondent Pertamina's Memorandum in Opposition to Further, KBC's Motion for Summary Judgment [Doe. #29], at 57 ("The award violates public policy and should not be enforced because, by awarding $150 million in lost profits where KBC had not yet even begun construction of a power plant, could not have reasonably done so, and would have senselessly contributed to the further impoverishment of Indonesia by doing so, it sanctions an abuse of rights by KBC and against Pertamina and PLN (and ultimately, the people of Indonesia")); *id.* at 64 ("And the economic distress to which Indonesia had fallen in 1997 had no more improved as of the hearing in this case than it had in the *Himpurna* or *Patuha* cases, and there continues to be a considerable over-supply of electricity."); *id.* at 64 n.37 ("As of July 27, 2001, the Dollar-Rupiah exchange rate (1:10050) is still more than four times greater than it was before the Asian financial crisis, thus increasing the prospective prices for KBC's electricity by *four-fold*; clearly this is prohibitive in the dramatically depressed Indonesian economy. . . . It remains the fact that the natural resources of Indonesia belong to the Government for the benefit of all people; they do not belong to Pertamina. Pertamina's exploitation of those resources is for the benefit of the people of Indonesia, not for its own benefit or for the benefit of any private parties, and payment of the Award would cause a very substantial blow to Indonesia's precarious economic

standing."). Presumably, Pertamina intends to argue that the Award violates Indonesian public policy for the same reasons it argued that Award violates United States public policy, namely because it holds Pertamina liable for engaging in conduct that was compelled by Indonesian law, which governed the parties' relations" and because it is "injurious to the public interest."[9] *Id.* at 67. Thus, Pertamina's efforts to relitigate the same issues actually decided by this Court is an obvious attempt to attack this Court's jurisdiction by relitigating old issues in a more favorable forum.[10]

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9. Pertamina's argument that the damages award is contrary to public policy because it would be injurious to the Indonesian economy is at odds with its position that it is an independent company and the Indonesian government is not liable for its debts. The Court is not making a ruling as to the ownership of any assets at this time. If in fact Pertamina has no assets subject to execution, as it has contended in response to KBC's attempts at execution, then the existence of the Arbitral Award itself will not affect Indonesia's assets nor injure the Indonesian economy.

10. Pertarnina is much like the vexatious plaintiffs enjoined in *Younis Bros. & Co. v. Worldwide Ins. Co.*, 167 F.Supp. 2d 743, 747 (E.D. Pa. 2001):

> [P]laintiffs are obviously unhappy with the results of their litigation [in the United States] and are attempting to get a'second opinion' from the Liberian courts . . . [defendant] has already succeeded on the merits, and it will be irreparably harmed if it is forced to continue to defendant against plaintiff's' vexatious and duplicative Liberian litigation and/or defend against execution upon a judgment that conflicts with the final judgment in this case.

Appendix D

In this case, Pertamina never raised the possibility of seeking annulment of the Arbitral Award by an Indonesian court during the summary judgment proceedings, despite Pertamina's awareness of the defense to enforcement provided by Article V(1)(e) of the New York Convention. Furthermore, Pertamina has spared no expense in its attack on the Arbitral Award. The company is represented by highly regarded, sophisticated lawyers who have raised every conceivable argument in Pertamina's defense. The Indonesian Action appears to be no more than a last ditch effort to avoid the effect of this Court's Judgment enforcing the Arbitral Award.

To the extent Pertamina contends that the Indonesian Action is based on grounds not presented to this Court, that position depends on a finding that, pursuant to the parties' agreements, Indonesian arbitral law applied in the arbitration.[11] Pertamina's interpretation of the contracts in this regard is unpersuasive.[12] Under Pertamina's own expert's

11. There is no dispute that Indonesian law applied to the merits. However, Pertamina does not argue that the choice of substantive law governs the forum for its annulment proceeding under the New York Convention.

12. Pertamina's own expert points out that "if the parties agree on a place of arbitration, it is generally assumed that such agreement implies a choice on the arbitration law of the place of arbitration. However, if the parties have agreed on a place of arbitration and the applicability of the arbitration law of another country (which is exceptional), they have agreed on the place of arbitration in the physical sense as opposed to the one they agreed to in the legal sense." Expert Report of Jan van den Berg, ¶ 9. Jan van den Berg further states "[m]y own view is that the agreement to arbitrate under the law of a country which is not the country in which the award is to be

(Cont'd)

standards, the parties failed to make it clear in the governing agreements that Indonesian *arbitral* law was to apply. Rather, the parties made it clear to the arbitrators that the arbitration in fact was to be conducted under the arbitral law of Switzerland.[13] The Court combed the arbitration record

(Cont'd)
made needs to be clear as it is a rather exceptional agreement." Expert Report of Jan van den Berg, ¶ 20. Yet, Jan van den Berg seems to ignore his own standards when he goes on to opine that the parties' mere reference to certain provisions of the Indonesian Code of Civil Procedure is a sufficiently "clear" expression of the parties' intent to make the "rather exceptional" selection of Indonesian law as the law governing the arbitration and award. *Id.* ¶ 27. This Court places no weight on this expert's ultimate conclusion as to the parties' intent as to the choice of arbitral law.

13. *See, e.g.*, Preliminary Award in an Arbitration Procedure Under the UNCITRAL Arbitration Rules, September 30, 1999, § B(1) ("The Respondents support this conclusion by making reference to Swiss law as the JOC and the ESC provide for UNCITRAL Arbitration in Geneva between the parties which are neither Swiss nor Swiss resident. As a result, and under both contracts, the arbitration proceedings are governed by Chapter 12 of the Swiss Private International Law Statutes. Under Swiss law, [Respondent contends] the Arbitral Tribunal is lacking jurisdiction because KBC failed to comply with the contractual prerequisites to arbitration."); *id.* § C(1) ("'The Respondents also state that, under the arbitration agreements and Swiss law, the arbitrators have no power to consolidate . . ."); *id.* § C(3) (citing the "famous Westland Case" of the Swiss Federal Tribunal in support of its decision that a consolidated arbitration was appropriate); *id.* § D(1) (Respondents contend "such solution is not acceptable under the applicable Swiss law"). For this reason, it is not necessary to interpret the underlying contracts or to address KBC's argument that Pertamina's Expert Report of Albert Jan van den Berg improperly assumes the role of the Court by interpreting the contracts.

presented by the parties in connection with the summary judgment motion and the pending motion and has found no indication that Pertamina ever argued for the application of Indonesian arbitral law.[14] Under Pertamina's own theory, the New York Convention vests jurisdiction to set aside an arbitral award only in the "country in which, or under the law of which, that award was made." There can be no doubt that the physical and legal situs of the Arbitral Award was Geneva, Switzerland. Since Pertamina never argued in the arbitration that the parties' contracts selected Indonesian arbitral law, and the arbitral panel adopted Swiss arbitral law, Pertamina is bound to its prior positions.[15] *See supra* n.13 and cites therein.

Pertamina's new posture is further undermined by its previous representations to this Court that the arbitration was conducted pursuant to Swiss arbitral law.[16] Pertamina's

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14. In fact, as the Court pointed out in its December 2001 Memorandum and Order affirming the Arbitral Award, Pertamina's counsel expressly represented to the tribunal at the close of evidence that Pertamina had no objections (beyond those already lodged) to the arbitration proceeding. Hearing Transcript, Vol. V, at 814.

15. An arbitration decision can have collateral estoppel or *res judicata* effect between the same parties in a subsequent proceeding. *Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1137 (5th Cir. 1991); RESTATEMENT (SECOND) JUDGMENTS § 84 (1980).

16. Although the Court denied Pertamina's motion to stay the enforcement proceeding pending a decision from the Swiss court, the Court did slow the proceedings in this case in deference to

(Cont'd)

comments in its motion for a stay of the instant case pending resolution of Pertamina's Swiss appeal, filed May 19, 2001, are telling. Pertamina argued not only that the Swiss Supreme Court had jurisdiction to hear its appeal (without eliminating the possibility that an Indonesian court might share such jurisdiction), but also urged specifically, repeatedly and unequivocally that Swiss arbitration law applied in the arbitration. Pertamina opened its Motion by stating: "The arbitration award . . . was conducted subject to the arbitration laws of Switzerland, and the Swiss court is empowered to vacate an award rendered in Switzerland. . . . KBC is asking this Court to act prematurely to confirm an award that might be overturned in the country whose law governed the arbitration."[17] Pertamina added that "it is fundamental that the courts of the originating nation are in the best position to pass on issues under their own law. . . .

(Cont'd)

Pertamina's request. The Court finds that this is an appropriate case for application of judicial estoppel. There are no inflexible prerequisites nor is there a definitive formula for determining the applicability of judicial estoppel. *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001); *see also United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993) ("the policies underlying the doctrine [of judicial estoppel] include preventing internal inconsistency, precluding litigants from 'playing fast and loose' with the courts, and prohibiting parties from deliberately changing positions according to the exigencies of the moment."). This Court was led to believe that the Swiss court had exclusive jurisdiction to annul the Arbitral Award and it relied on that representation in proceeding to final judgment in this enforcement proceeding only after the Swiss appeal was dismissed and that dismissal became final.

17. *See* Respondent Pertamina's Motion for Stay Pending Resolution of Swiss Appeal and Memorandum in Support [Doc. #13], at 1.

Here, Pertamina's appeal encompasses questions of Swiss law." *Id.* at 6; *see also* Respondent Pertamina's Memorandum in Opposition to KBC's Motion to Summary Judgment [Doc. # 29], at 34-35 ("By adopting an arbitral procedure that resulted in such a disparate outcome, the tribunal thus exceeded its authority and failed to accord the parties equal treatment in direct contravention of the procedural law governing this arbitration. *See* RLA 1, Swiss Private International Law Statute ("PIL"), Article 182(3) ('the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in an adversarial procedure'); UNCITRAL Arbitration Rules, LA-6, Article 15 (requiring that parties 'are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case'). Neither the UNCITRAL Arbitration Rules nor the Swiss Private International Law Statute provide for non-consensual consolidation of arbitration disputes.").[18] Because Swiss arbitral law applied in the arbitration, Pertamina's argument that only the court in Indonesia has jurisdiction to annul the Arbitral Award under the New York Convention, and thus Pertamina's defense to KBC's preliminary injunction, fails entirely.

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18. As a practical matter, Pertamina's current suggestion that both Switzerland and Indonesia have jurisdiction to set aside the award seems particularly at odds with the "well established principal of current international commercial arbitration that the court of the country of origin is **exclusively competent** to decide on the setting aside of the award." ALBERT JANVAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 10 (Kluwer Law and Taxation Publishers 1981) (emphasis added).

Appendix D

III. CONCLUSION AND ORDER

Because the injunction entered against KBC in Indonesia and the annulment proceeding pending there threaten both this Court's jurisdiction to enforce its Judgment and KBC's rights, the Court concludes that a preliminary injunction is warranted. It is therefore,

ORDERED that KBC's Motion for Preliminary Injunction [Doc. # 88] is **GRANTED**. It is further

ORDERED that Pertamina shall not at any time while this Preliminary Injunction is in force seek to enforce the Indonesian Injunction entered in its favor against KBC on April 1, 2002 in District Court in Jakarta, Indonesia. It is further

ORDERED that Pertamina shall not at any time while this Preliminary Injunction is in force collect (or take steps to collect) any fine or penalty from KBC as a result of the Indonesian Injunction entered in its favor against KBC on April 1, 2002 in District Court in Central Jakarta, Indonesia. It is further

ORDERED that while this Preliminary Injunction is in force, Pertamina shall indemnify KBC for all monetary punishments or penalties imposed under the Indonesian Injunction as a result of any action taken by KBC to enforce the Arbitral Award or to execute on the Judgment. It is further

ORDERED that if any order is issued by any court against KBC ordering KBC to pay penalties arising from the

Indonesian Injunction, Pertamina shall pay KBC such monies prior to KBC having any obligation to pay Pertamina or the ordering court such amounts. It is further

ORDERED that Pertamina shall take no action while this Preliminary Injunction is in force to prosecute the action it filed against KBC in the District Court in Central Jakarta, Indonesia. It is further

ORDERED that Pertamina shall inform the District Court in Central Jakarta, Indonesia that it cannot and will not take any action to pursue the action pending there. It is further

ORDERED that the Temporary Restraining Order and Order of Contempt issued by this Court April 9, 2002, as extend by Order issued April 17, 2002, is superseded by this Preliminary Injunction, and all restraints not expressly set forth in this Preliminary Injunction are dissolved.

SIGNED this 26th day of April, 2002.

s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED AND FILED MAY 17, 2002

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-20550

KARAHA BODAS COMPANY LLC

Plaintiff - Appellee

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA; ET AL

Defendants

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA

Defendant - Appellant

Appeal from the United States District Court for the Southern District of Texas, Houston

Before DeMOSS, PARKER, and DENNIS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion for partial stay pending appeal is Denied.

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, DATED JUNE 28, 2002 AND ENTERED JULY 3, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H 01-0634

IN THE MATTER OF AN
ARBITRATION BETWEEN

KARAHA BODAS COMPANY, L.L.C.,

Petitioner,

v.

PERUSAHAAN PERTAMBANGAN
MINYAK DAN GAS BUMI NEGARA,

Respondent.

ORDER

Pending before the Court is Petitioner Karaha Bodas Company, L.L.C.'s June 27, 2002 letter requesting expedited consideration of its Amended Second Motion for Contempt ("KBC's Amended Motion) [Doc. # 161]. Pursuant to the briefing schedule currently in effect, Respondent Perusahaan Pertambangan Minyak Dan Gas Bumi Negara's ("Pertamina's")

response to KBC's Amended Motion is due July 1, 2002, KBC's reply is due July 8, 2002, and any sur-reply is due by July 11, 2002. Accordingly, it is

ORDERED that until and unless this Court's April 26, 2002 Preliminary Injunction [Doc. # 137] is overturned or modified by a higher court, Pertamina and KBC shall fully and strictly comply with that Preliminary Injunction, which, among other things, prohibits Pertamina from taking any steps to pursue a nullification action in Indonesia. Failure to comply with the Preliminary Injunction will result in sanctions to the violating party, which may include contempt. It is further

ORDERED that the Court is taking KBC's Amended Motion under advisement and intends to rule promptly upon completion of briefing on July 11, 2002.

SIGNED at Houston, Texas, this 28th day of June, 2002.

s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

APPENDIX G — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, DATED JULY 19, 2002 AND ENTERED JULY 22, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H 01-0634

IN THE MATTER OF AN ARBITRATION BETWEEN
KARAHA BODAS COMPANY, L.L.C.,

Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK
DAN GAS BUMI NEGARA,

Respondent.

MEMORANDUM AND ORDER

This matter is before the Court on Perusahaan Pertambangan Minyak Dan Gas Bumi Negara's (Pertamina's) Cross-Motion for Stay of Enforcement ("Motion to Stay Enforcement") [Doc. # 101] and Pertamina's Motion and Memorandum of Law in Support of it's Motion For a Partial Stay Pending Appeal of the Order Granting Preliminary Injunction ("Motion to Stay Preliminary Injunction") [Doc. # 148]. Also before the Court are Petitioner Karaha Bodas

Company, L.L.C.'s ("KBC'S") Motion for Leave to Register Judgment in Illinois ("Motion to Register") [Doc. # 80] and Motion for In Camera Review of the Affidavit of Christopher F. Dugan ("Motion for In Camera Review") [Doc. # 81]. The motions have been fully briefed and are ripe for determination.[1] Having reviewed the parties' submissions, all matters of record, and applicable legal authorities, the Court concludes that Pertamina's Motion to Stay Enforcement and Motion to Stay Preliminary Injunction should be **denied**, and KBC's Motion to Register and Motion for In Camera Review should be **granted**.

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 4, 2001, a final judgment confirming an international arbitration award ("Arbitral Award") was entered against Pertamina in favor of KBC for $261,166,654.92 plus interest ("Judgment"). Pertamina has appealed the Judgment, but has not filed a supersedeas bond staying execution.

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1. *See* KBC's Opposition to Motion to Stay Enforcement of the Judgment [Doc. # 133]; Pertamina's Reply in Support of its Motion for Stay of Enforcement [Doc. # 142]; KBC's Sur-Reply to Pertamina's Reply Motion to Stay Enforcement of the Judgment [Doc. # 146]; KBC's Memorandum in Opposition to Pertamina's Motion to Stay the Preliminary Injunction ("KBC's Opposition") [Doc. # 159]; Pertamina's Reply in Support of its Motion for Partial Stay Pending Appeal of the Order Granting Preliminary Injunction [Doc. # 167]; Pertamina's Opposition to KBC's Motion to Register Judgment in Illinois and Motion for In Camera Review [Doc. # 83]; Pertamina's Supplemental Memorandum in Support of its Opposition [Doc. # 85]; and KBC's Combined Reply to Pertamina's Opposition [Doc. # 96].

Appendix G

In an Order entered January 25, 2002, this Court found that a reasonable period of time had passed since entry of the Judgment and authorized KBC to commence proceedings to execute on the Judgment. KBC sought and was granted leave to register the Judgment in New York, Delaware, and California.

In March, 2002, Pertamina commenced an action in Jakarta, Indonesia, to annul the Arbitral Award, and obtained an injunction against KBC's enforcement of the Judgment. This Court granted KBC a Preliminary Injunction on April 26, 2002 prohibiting Pertamina from pursuing the Indonesian action or enforcing the Indonesian injunction against KBC, and requiring Pertamina to withdraw the Indonesian action [Doc. # 137]. Pertamina has appealed the Preliminary Injunction.

Pertamina now seeks a stay of enforcement of this Court's January 2002 Judgment until the Indonesian Court has decided whether to annul the Arbitration Award. Pertamina further seeks a stay of the Preliminary Injunction so that it may pursue the Indonesian action without fear of sanctions. Also pending before the Court is KBC's Second Motion for Contempt[2] based on Pertamina's repeated refusal

2. Prior to issuing the Preliminary Injunction, the Court issued a Temporary Restraining Order, after notice and hearing, requiring Pertamina to withdraw the Indonesian injunction. Pertamina did not do so. KBC then filed it's first Motion for Contempt, which the Court granted by Order dated April 9, 2002 [Doc. # 129].

to comply with the Preliminary Injunction, which will be the subject of a separate order.[3]

II. ANALYSIS

Motion to Stay Enforcement.— In the Preliminary Injunction Order, the Court noted that Pertamina had filed a motion to stay enforcement of the Judgment to permit Pertamina to pursue annulment in Indonesia. At that time, the Motion to Stay Enforcement was newly ripe for determination and the Court refrained from issuing a final ruling before having an opportunity to consider fully the parties' briefs. Having now considered all the pertinent materials and applicable authorities, the Court concludes that the Motion to Stay Enforcement is moot. The Preliminary Injunction requires Pertamina to withdraw and take no further action to prosecute the Indonesian action. There is no basis to stay enforcement of the Judgment pending completion of a suit this Court has found lacks legal foundation under applicable treaties, and has expressly prohibited Pertamina from pursuing. Therefore, Pertamina's Motion to Stay Enforcement is denied.

Motion to Stay Preliminary Injunction.— Pertamina seeks, pursuant to Rule 8 of the Federal Rules of Appellate Procedure, a stay of the Preliminary Injunction prohibiting Pertamina's prosecution of its action in Indonesia. The Court considers four factors in determining whether to stay its

3. On July 12, 2002, this Court issued an Order for Discovery in Aid of Civil Contempt [Doc. # 176] in connection with KBC's pending, and seemingly well-founded, Second Motion for Contempt.

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Preliminary Injunction pending appeal: (1) whether Pertamina has made a showing of likelihood of success on the merits; (2) whether Pertamina has made a showing of irreparable injury if the stay is not granted; (3) whether the stay would substantially harm KBC; and (4) whether the stay would serve the public interest. *See Coastal States Gas Corp. v. Department of Energy*, 609 F.2d 736, 737 (5th Cir. 1979).

Pertamina contends that absent a stay of the Preliminary Injunction while its appeal is pending it will suffer irreparable harm because it will be deprived of its defense under Article V(1)(e) of the New York Convention in jurisdictions where KBC seeks to enforce the Arbitral Award or Judgment. Pertamina further contends that it is likely to succeed on the merits of its appeal because the Preliminary Injunction misinterprets and misapplies the New York Convention and case law allowing injunctions against foreign suits. While Pertamina has submitted voluminous materials, including expert declarations different from the ones submitted in response to KBC's preliminary injunction requests, in support of its position, Pertamina's Motion to Stay Preliminary Injunction raises the same arguments that the Court considered and rejected in deciding to grant a Preliminary Injunction in favor of KBC.[4] Pertamina's motion is in effect

4. Even if Pertamina's new expert declarations (*see* Opinion of Professor W. Michael Reisman, Exhibit 1 to Motion to Stay Preliminary Injunction and Supplemental Expert Report of Albert Jan Van Den Berg, Exhibit 2 to Motion to Stay Preliminary Injunction, as well as Exhibits 3-7 to Motion to Stay Preliminary Injunction) were deemed timely filed, a significant issue for reasons explained in the text hereafter, the Affidavits do not persuade the Court that

(Cont'd)

an untimely motion for reconsideration. The Preliminary Injunction is now on appeal to the Fifth Circuit. It is for the appeals court to decide if the Preliminary Injunction is based on a misinterpretation or misapplication of the law. The Court reaffirms its ruling granting the Preliminary Injunction.

As to the second element necessary to justify a stay pending appeal, the Court finds that harm to Pertamina from the injunction is not significant. Pertamina is free to make any arguments and assert all defenses it has to confirmation or enforcement of the Arbitral Award in foreign jurisdictions. Pertamina has apparently continued, in direct violation of this Court's order, to prosecute the Indonesian action. Thus, Pertamina's claim of harm from the Preliminary Injunction is disingenuous, at best.[5] In any event, if the Fifth Circuit

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(Cont'd)

Indonesia is the proper jurisdiction for a proceeding to annul the Arbitral Award. Van Den Berg concedes that "an agreement on a law applicable to the arbitration other than the arbitration law of the place of arbitration is rather exceptional and hence should be clearly expressed." Supplemental Expert Report, ¶ 42. The contracts do not clearly express an agreement of the type Van Den Berg describes. In fact, Pertamina's original choice to pursue an annulment proceeding in Switzerland is persuasive evidence that the parties did ***not*** intend such an agreement. Moreover, the expert opinions do not overcome the judicial estoppel effect of Pertamina's prior unequivocal representations to the Arbitral Tribunal, the Swiss Supreme Court, and this Court that Switzerland is the proper jurisdiction for a proceeding to annul KBC's Arbitral Award.

5. The effect of granting a stay pending appeal would be to insulate Pertamina from contempt for violating the Preliminary Injunction. The Court does not rule on the pending contempt motion.

reverses the Preliminary Injunction, Pertamina will be free to pursue its action in Indonesia at that time.[6]

A stay of the Preliminary Injunction, on the other hand, will substantially harm KBC. If a stay were granted, Pertamina would have the opportunity, contrary to applicable international treaties, to seek an order purporting to annul the Arbitration Award by the Indonesian Court before the Fifth Circuit rules on the appeal. In that circumstance, KBC may lose the benefit of any ruling on the merits in its favor. It is noted, further, that if Indonesia eventually is held to be the proper jurisdiction for an annulment proceeding, any prejudice to Pertamina from the denial of a stay is directly attributable to its failure to promptly seek annulment of the award in Indonesia (rather than Switzerland) and its failure to promptly seek annulment prior to allowing this Court to proceed to final judgment in the confirmation proceeding initiated by KBC. Pertamina, not KBC, bears responsibility for Pertamina's own strategic decisions.

There is no public interest at stake that justifies a stay of the Preliminary Injunction. As noted in the Preliminary

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6. Pertamina suggests that any dismissal of the Indonesian action would likely have to be with prejudice absent the agreement of all parties. Declaration of Professor Mr. Dr. S. Gautama, Exhibit 7 to Motion to Stay Preliminary Injunction. KBC has made it clear that it will agree to dismissal without prejudice, eliminating the only real hurdle facing Pertamina. KBC's Opposition, at 7. There is no credible explanation why PLN, which Pertamina joined as a *defendant* in the annulment proceeding, would not also agree, as any dismissal would also be without prejudice to any right it may have to pursue an annulment action.

Injunction, international comity is not implicated here because Indonesia lacks a legitimate jurisdictional interest. Also, the Preliminary Injunction is directed to the actions of Pertamina, which submitted to the jurisdiction of this Court. The Court has not issued any directive to the Indonesian Court.

The Court concludes that the factors for granting a stay pending appeal weigh against granting a stay in this case. Pertamina's Motion to Stay Preliminary Injunction is denied.[7]

Motions to Register Judgment in Illinois and For In Camera Review.—

Section 1963 of Title 28 of the United States Code provides in relevant part:

> A judgment in an action for the recovery of money or property entered in any court of appeals, district court, bankruptcy court, or in the Court of International Trade may be registered by filing a certified copy of the judgment in any other district or, with respect to the Court of International Trade, in any judicial district, when the judgment has become final by appeal or expiration of the time for appeal or *when ordered by the court that entered the judgment for good cause shown.*

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7. While Pertamina's Motion to Stay Preliminary Injunction was pending in this Court, Pertamina filed a similar Emergency Motion for Partial Stay Pending Appeal in the Fifth Circuit. *See* KBC's Memorandum in Opposition to Pertamina's Motion to Stay the Preliminary Injunction, Exhibit 2. The Fifth Circuit summarily denied Pertamina's motion. *Id.*, Exhibit 1.

(Emphasis added.) Good cause is shown by evidence that the defendant lacks sufficient property in the judgment forum to satisfy the judgment, and has substantial property in another district. *Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc.*, 259 F.3d 1186, 1197-98 (9th Cir. 2001). KBC has shown, and Pertamina does not contest, that Pertamina has insufficient assets in Texas to satisfy the judgment. KBC has also presented evidence in the form of the Affidavit of Christopher F. Dugan to show that Pertamina has assets subject to execution in Illinois. Pertamina makes no representation that it has no assets in Illinois.

Pertamina objects to KBC's registration of the Judgment in Illinois on the grounds that KBC's has been oppressive and overreaching in its enforcement efforts, and because the *in camera* review of Dugan's Affidavit prevents it from asserting defenses to execution under the Foreign Sovereign Immunities Act ("FSIA").

KBC's Motion to Register and Motion for In Camera Review are based on the same argument and legal authority as the motions previously granted by this Court in its February 15, 2002 Order [Doc. # 68] allowing KBC to register the Judgment in New York, Delaware, and California. For the same reasons expressed in that Order, the Court concludes that *in camera* review of the current Affidavit of Christopher F. Dugan is appropriate. Further, based on the entire record, the Court finds that KBC should be allowed to register the Judgment in Illinois.

Finally, in opposition to KBC's motion to register, Pertamina has submitted copies of the voluminous briefing and exhibits it presented to the United States District Court for the Southern District of New York in response to KBC's restraint of significant funds held in New York banks. Since completion of the briefing on the instant Motion to Register, Judge Grisea of the Southern District of New York has issued an opinion regarding the availability of certain Pertamina assets for execution in New York. *Karaha Bodas Company, L.L.C. v. Pertamina*, No. M-18-302 (S.D.N.Y. April 26, 2002). KBC's instant motion seeks only to *register* the Judgment; it is not a motion to execute on any specific property. Pertamina is free to argue, in Illinois or in other jurisdictions, that Judge Grisea's rulings should have collateral estoppel effect in connection with KBC's execution efforts. Further, KBC must comply with the FSIA and all requirements for securing and enforcing a writ of execution in the jurisdiction in which Pertamina's assets are located. The arguments before Judge Griesa pertaining to execution on specific assets are not relevant to a decision by this Court to permit KBC to register the Judgment in other jurisdictions. This Court should not and will not address execution matters in other states. Pertamina's arguments about the proceeding before Judge Griesa are misplaced and are rejected.

III. *CONCLUSION AND ORDER*

The Court concludes that neither a stay of enforcement of the Judgment nor a stay of the Preliminary Injunction is appropriate in this case. In addition, the Court concludes that KBC has shown good cause for leave to register the Judgment in Illinois. It is therefore

ORDERED that Pertamina's Motion to Stay Enforcement [Doc. # 101] is **DENIED**. It is further

ORDERED that Pertamina's Motion to Stay Preliminary Injunction [Doc. # 148] is **DENIED**. It is further

ORDERED that KBC's Motion for In Camera Review [Doc. # 81] is **GRANTED**. It is further

ORDERED that KBC's Motion to Register the Judgment in Illinois [Doc. # 80] is **GRANTED**.

SIGNED at Houston, Texas, this 19th day of July, 2002.

s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

APPENDIX H — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, DATED FEBRUARY 7, 2003 AND ENTERED FEBRUARY 11, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

CIVIL ACTION NO. H 01-0634

IN THE MATTER OF AN ARBITRATION BETWEEN

KARAHA BODAS COMPANY, L.L.C.,

Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,

Respondent.

MEMORANDUM AND ORDER

Pending before the Court in this matter involving an international arbitral award are Petitioner Karaha Bodas Company's ("KBC's") Amended Second Motion for Contempt [Doc. # 161],[1] KBC's Motion to Extend the July

1. This motion was partially resolved by this Court's July 12, 2002 Order For Discovery in Aid of Civil Contempt [Doc. # 176], but the Court took under advisement resolution of KBC's request for contempt sanctions.

22 Order [Doc. # 185], and KBC's Motion for Sanctions [Doc. # 187]. These motions relate to Respondent Perushahaan Pertambangan Minyak Dan Gas Bumi Negara's ("Pertamina's") conduct in an action against KBC in Indonesia allegedly in violation of this Court's Preliminary Injunction entered April 26, 2002 [Doc. # 137]. These motions have been extensively briefed by both parties.

Pertamina's appeal of the April 26, 2002 Preliminary Injunction and its appeal of this Court's Final Judgment affirming the arbitral award in favor of KBC [Doc. # 46], are currently pending before the Court of Appeals for the Fifth Circuit. The Court deems it appropriate to withhold ruling on KBC's Amended Second Motion for Contempt and Motion for Sanctions pending rulings by the Fifth Circuit on the validity of this Court's underlying rulings on which they are based.

KBC's Motion to Extend July 22 Order is based on KBC's characterization of this Court's July 22, 2002 Order [Doc. # 179] as a temporary restraining order ("TRO"), which KBC feared would expire in ten days. KBC requested an extension through August 6, 2002.[2] The July 22, 2002 Order was not a TRO, but was intended to protect the *status quo* under the pre-existing preliminary injunction. That injunction remains in effect. The July 22, 2002 Order was intended to remind the parties of their obligations under the preliminary injunction. Thus, KBC's Motion to Extend is moot. It is therefore

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2. KBC filed its motion on Friday, August 2, 2002.

ORDERED that KBC's Amended Second Motion for Contempt [Doc. # 161] and KBC's Motion for Sanctions [Doc. # 187] are **STAYED AND ADMINISTRATIVELY CLOSED** pending resolution of Pertamina's appeals, which are the Fifth Circuit's appeals No. 02-20042 and No. 02-20550. The Court will reactivate these motions upon issuance by the Fifth Circuit's of the mandate on its decision in the last remaining appeal. It is further

ORDERED that KBC's Motion to Extend the July 22 Order [Doc. # 185] is **DENIED AS MOOT**.

SIGNED at Houston, Texas, this 7th day of February, 2003.

s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

APPENDIX I — DECISION OF THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, COURT OF FIRST INSTANCE, DATED MARCH 27, 2003

IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO 28 OF 2002

BETWEEN

KARAHA BODAS COMPANY LLC

Plaintiff

and

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA (otherwise known as PERTAMINA)

Defendant

Before Hon Burrell J in Chambers
Dates of Hearing 7-9, 17 January and 12 March 2003
Date of Handing Down of Decision 27 March 2003

DECISION

1 On 15 March 2002, this court grated the plaintiff ("KBC") leave, *ex parte*, to enforce an arbitration award made

in Geneva on 18 December 2000 to the same manner as a judgment and to enter judgment in the amount of the award On the same date a judgment was entered pursuant to that leave By this summons the defendant ("Pertamina") applies under Order 73, rule 10 to set aside the order

2 The court has had the benefit of extensive legal argument over five days on a number of issues from Mr Jat Sew-tong, SC leading Ms Grace Chow (for KBC) and Mr Marks Strachan, QC (UK) and Mr Charles Manzom (for Pertamina)

3 The matter has a long and fairly complex history There have been and there continue to be proceedings in a number of different countries Very large sums of money are at stake A thumbnail sketch in so far as it relates to the Hong Kong proceedings, is as follows

4 In November 1994, two contracts were executed in Indonesia Firstly, there was a Joint Operation Contract ("JOC") between KBC and Pertamina This contract, according to its own terms was "governed by the laws and regulations of the Republic of Indonesia" KBC is a Cayman Islands Company with its centre of operations in the USA Pertamina is an Indonesia state-owned oil and natural gas exploration company By the JOC Pertamina appointed KBC as the sole contractor for the exploration and development of geothermal energy in West Java It also required KBC to build, own and operate electricity generating facilities

5 Secondly, there was an Energy Sales Contract, ("ESC") This was made between P T PLN (Persero)

("PLN") on the one hand and Pertamina and KBC on the other PLN is another Indonesian state-owned electricity enterprise The ESC was also "governed by the laws and regulations of the Republic of Indonesia" By the ESC any energy that was developed by the exploration would be sold to PLN

6 The project came to a halt as a result of Indonesian Government decrees in 1997 and 1998 It was suspended and remains suspended On 30 April 1998, KBC served a notice of arbitration upon Pertamina, PLN and the Government of Indonesia An arbitration was convened, its legal seat was Geneva (as found by this decision) but, for convenience, the Tribunal sat in Paris A preliminary award was issued on 30 September 1999 which found in KBC's favour This application is the Hong Kong part of international enforcement proceedings of the award

7 The award is a New York Convention award Accordingly, Pertamina must establish one or more of the grounds, upon which a Hong Kong court may refuse enforcement, found in sections 44(2)(a)-(f) and (3) of Cap 341, the Arbitration Ordinance The relevant provisions are as follows

44 Refusal of enforcement

(1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section

(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves-

(*a*) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity, or

(*b*) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made, or

(*c*) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case or

(*d*) subject to subsection (4) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration, or

(*e*) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement, with the law of the country where the arbitration took place or

(*f*) that the award has not yet become binding on the parties or has been set aside or

suspended by a competent authority of the country in which or under the law of which, it was made

(3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award

8 By its summons, Pertamina contends that this is a case in which enforcement should be refused in Hong Kong The matters upon which they rely and thus, the issues which fail for consideration and resolution by this court are, in summary form, as follows (as contended by Pertamina)

(1) The award has been set aside by the Central Jakarta District Court being a competent authority of the country under the laws of which the Award was made, namely Indonesia

(2) There was no written agreement which permitted the claims made under the JOC and the ESC to be consolidated to a single arbitration with a single arbitrator being appointed jointly for Pertamina and PLN

(3) The Tribunal wrongly permitted the Claims made under the JOC and the ESC to be adjudicated in a single arbitration

(4) The arbitrators were not appointed in the manner prescribed by the JOC and the ESC

(5) The Tribunal refused Pertamina an adjournment that was necessitated by a significant change in KBC's case shortly before the hearing, as a result of which Pertamina was unable properly to present its case

(6) The Tribunal denied Pertamina an application for discovery of documents relevant to the said change in KBC's case, as a result of which Pertamina was unable properly to present its case

(7) The Tribunal failed to apply Indonesian law, being the governing law of the JOC and the ESC, to issues which were central to the dispute between the parties

(8) Enforcement of the award would be contrary to the public policy of Hong Kong

9 Before dealing with each of these issues, some of the general principles which underlie the court's approach in enforcement proceedings such as these should be set out

(i) Provided certain requirements are met the Hong Kong courts grant an order of enforcement *ex parte* It is then up to the other party to apply to set aside the *ex parte* order This demonstrates a pro-enforcement starting point in Hong Kong As stated by the authors to *Redfern & Hunter's Law and Practice of International Commercial Arbitration*, most national courts have recognized and approved a "pro-enforcement" bias

(ii) The only grounds upon which an award can be refused are those contained in Cap 341, section 44 The burden is on the defendant to persuade the court that one of those grounds apply

(iii) The task of the court is confined to deciding whether or not one of the section 44 grounds apply In carrying out this task it should not be concerned with the merits of the award

(iv) If the defendant discharges the burden of proof on it the court retains a residual discretion to, nonetheless, enforce the award

(v) Section 44(3) (the "public policy" ground) is to be construed narrowly Its application is confined to those cases where it would be "contrary to the fundamental conceptions of morality and justice" to enforce the award (*per* Mason NPJ in *Heben Import and Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKCFAR at p 139)

10 I turn now to the individual grounds

1 SECTION 44(2)(f)

11 Pertamina contend that the award has been set aside by a competent authority under the laws of which the award was made

12 On 27 August 2002, a court in Jakarta set aside the award Pertamina contend that the award was made under

Indonesian law and an Indonesian court has set it aside therefore sub-section (2)(f) applies

13 KBC say the law under which the award was made was Swiss law therefore (2)(f) does not apply

14 Reference to "the law" in sub-section (2)(f) undoubtedly refers to the law which governed the procedural law of the arbitration, not the substantive law of the contract A variety of expressions are used to describe this such as, *lex arbitri*, curial law and procedural law For consistency I shall use the expression *lex arbitri* What is not meant by "law" in sub-section (2)(f) is the substantive law of the contract being arbitrated In this case that was indeed Indonesian law

15 The contract itself does not expressly state what the *lex arbitri* should be in the event of an arbitration However, in this case, in my judgment "the law" to which sub-section 2(f) refers is plainly Swiss law I have come to this conclusion both as a matter of fact and as a matter of law

(a) As a matter of fact

16 Sub-section (2)(f) ends with the words "under the law of which it was made" This logically means "the law of which it was, in fact, made" This court must decide which *lex arbitri* did the Swiss Tribunal actually apply An examination of the facts demonstrates clearly that it applied Swiss law The following factors, taken together, lead to this conclusion

(i) The parties chose a neutral place to arbitrate They chose one of the leading arbitral centres in the world,

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Geneva Had they intended the *lex arbitri* to be Indonesian law, they would have simply arbitrated in Indonesia The Tribunal itself was international in its makeup and of the highest calibre Geneva would not have been chosen as the seat of the arbitration for convenience but because of its neutrality The neutrality aspect would have been diluted had Indonesian law been the *lex arbitri*

(ii) It is a fact that Swiss law states that the *lex arbitri* of arbitrations conducted in Switzerland shall be Swiss law This is a mandatory provision Such a situation is commented on by the authors of *Redfern & Hunters* in the following terms

> In an international commercial arbitration, the proceedings are under the general supervision of the national law of the country in which the arbitration has its seat Any mandatory provisions of the law that governs the conduct of the proceedings must be taken into account If the parties prefer the law of a particular country (country A) to the law of the place of arbitration (country B) they should either
>
> > move to country A, or
> >
> > adopt as rules governing their arbitration the particular provisions that they admire in the law of country A

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To attempt to conduct an arbitration in country B according to the supervisory arbitration law of country A merely adds another tier of rules of law to those to which the parties (and the arbitral tribunal) must pay heed International commercial arbitration is complicated enough without such flights of fancy, fortunately, however it appears that in practice such a choice is rarely if ever made"

Lord Hodson in *James Miller & Partners v Whitworth Street Estates (Manchester) Ltd [1970]* AC quoted, at p 606, to the same effect from *Dicey & Morris, Conflict of Laws*, 8th edn

> Where the parties have failed to choose the law governing the arbitration proceedings, those proceeding must be considered, at any rate prima facie, as being governed by the law of the country in which the arbitration is held on the ground that it is the country most closely connected with the proceedings"

(iii) The conduct of the parties

References to and reliance on Swiss law as the *lex arbitri* can be found throughout the proceedings The following are examples

(a) On 10 January 1999, Pertamina a "Memorial regarding Preliminary Issues" document For present purposes the issues therein are not important What is of significance however are *Pertamina's* statements such as

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"Reference to Swiss Law supports this conclusion As a result, arbitration proceedings under both contracts are governed by Chapter 12 of the Swiss Private International Law Statute"

"Indeed, the Swiss Courts have required that parties strictly adhere to the precise terms of their arbitration agreement,"

"The arbitrators do not, under the arbitration agreements and (under) the Swiss law in force at the seat of the arbitration, have the power to"

"It would be subject to setting aside in Switzerland under Articles 179 and 190 of the Swiss PIL"

(b) On 30 September 1999, the Tribunal made its preliminary award It contains statements such as (when setting out *Pertamina's* submission)

"The arbitration proceedings are governed by Chapter 12 of the Swiss Private International Law Statutes"

"The Respondents also state that under Swiss law, the arbitrators have no power to"

"Such solution is not acceptable under applicable Swiss law"

(c) On 19 February 2001, the Tribunal stated, in a Post award decision

"a relief which is neither contemplated by the UNCITRAL Rules nor by the *lex arbitri*, Swiss law" This ruling was made twice in the same decision in relation to two separate issues

(d) Pertamina's initial response to the award was entirely consistent with their acceptance of Swiss law as the *lex arbitri* They, firstly, attempted to set aside the award in Switzerland Had they believed me *lex arbitri* was Indonesian law they would not have done so (There is thus force in KBC's submission that they only went to Indonesia to set it aside as a last resort)

(e) The enforcement proceedings which followed in the USA are uttered with references *by Pertamina* to Swiss *lex arbitri* In their written answer to KBC's petition they say

"in an arbitration conducted under the procedural laws of Switzerland and the substantive law of Indonesia"

"Pertamina appealed to the Swiss Supreme Court, the relevant authority in the formal situs of the arbitration"

The applicable law and treaties governing international arbitration give courts of the

arbitration situs, here Switzerland, authority to vacate"

Similarly, in Pertamina's "Discovery and Joint Management Plan" dated 29 May 2001 they say "The arbitration is subject to Swiss arbitration law" In their motion to Stay dated 19 June 2001, they say The award was conducted subject to the arbitration laws of Switzerland" These examples are not an exhaustive list There are more

(f) Pertamina's stance that the *lex arbitri* is Indonesian law has come very late in the day It's first appearance as Pertamina's position came when they went to Indonesia to seek an annulment of the award (described by Judge Atlas in the US enforcement proceedings as a "last ditch effort") As is pointed out by KBC, Pertamina's position on the *lex arbitri* only changed 30 months after the preliminary award was published, 15 months after the Final award (December 2000) and seven months after the Swiss Court dismissed the petition for revision (August 2001)

(g) All the above conduct, namely a consistent acceptance and reliance on Swiss law by Pertamina, is not only relevant as evidence that the *lex arbitri* was in fact Swiss but is also relevant in support of KBC's submission that Pertamina are now estopped from contending

otherwise In *China Nanhat Oil Joint Service Corp v. Gee Tat Holdings* [1995] 2 HKLR 215, Kaplan J gave careful consideration to the issue of estoppel and decided that

> The doctrine of estoppel can apply to the grounds of opposition set out in Article V of the New York Convention The question of estoppel is a fundamental principle of good faith On a true construction of the Convention there is a duty of good faith which in the circumstances of this case required the Defendant to bring to the notice of the full tribunal or the CIETAC Commission in Beijing its objections to the formation of the tribunal Its failure to do so and its obvious policy of keeping this point up its sleeve to be pulled out only if the arbitration was lost, is not one that is consistent with the obligation of good faith nor with any notions of justice and fair play

Pertamina submit that the *Gee Tai Holdings* principle is not applicable because they had not been "keeping the point up their sleeve" They submit that the lateness in taking the point was due to the fact that the time for commencing proceedings in Indonesia does not begin to run until the Award has been registered This is far from Pertamina's best point There was nothing to prevent them from stating their position that the *lex arbitri* was Indonesian law at any time Not only did they fail to do so they did the opposite It was a *volte-face*

(h) By the same token, because the court's consideration of section 44(2)(f) is a question of fact Pertamina's lengthy and interesting submissions on expert evidence on Indonesian law are not matters with which this court is concerned Similarly, the fact that the court in Indonesia has now annulled the award under its own law is also a matter which has no effect on this court's task

(b) As a matter of law

17 If, contrary to KBC's primary submission that determination of the *lex arbitri* is a question of fact, it is necessary to construe the arbitration clauses in the contracts to determine the *lex arbitri*, then this court places reliance on the following matters, in coming to the conclusion that the answer remains, Swiss law

18 From the wealth of authority cited by both counsel on this issue can be gleaned the following starting point "The curial law (*lex arbitri*) is normally but not necessarily the law of the place where the arbitration proceedings are held" (*per* Hobhouse J in *Dallal v. Bank Mellat* [1980] at p 252 "The place" plainly refers to the legal seat of the arbitration (here Geneva) not a random city of convenience for the arbitrators (here Paris) For the normal situation not to apply there must be strong pointers to the contrary Such pointers as there may be in this case cannot, in my view, be regarded as strong when put in context and balanced against the following factors

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(I) Had the parties wanted to, expressly, depart from the norm they could have said so in the contracts but they did not The contracts are specific as to the substantive law (Indonesian) but silent as to the *lex arbitri* Lord Mustill in *Channel Group v Balfour Beatty Ltd* [1993] AC at p 357 said

> Certainly there may sometimes be an express choice of curial law which is not the law of the place where the arbitration is to be held but in the absence of an explicit choice of this kind, or at least some very strong pointer in the agreement to show that such a choice was intended the inference that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible

Clearly, Pertamina and KBC did not make an "explicit choice" There are many other authorities in support of this general proposition, one being Potter J in *Sumitono v Oil & Natural Gas Commission* [1994] 1 Lloyd's Reports, at p 57

> There is it is true no express choice of curial law However, there is a clear requirement that the arbitration proceedings be held in London In the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the seat' of the arbitration,

ie the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings —"

It is acknowledged that the presumption may be rebutted by matters other than an express provision to the contrary, however, it seems to me that in the present case Pertamina's attempt to do so is forlorn

(2) The drafters of the contracts were explicit on many matters such as the choice of a neutral place (Geneva), the adoption of the UNCITRAL rules in the arbitration and the choice of Indonesian law as the law of the contracts It is not a difficult inference to draw that had Pertamina insisted on an express provision stating that the *lex arbitri* was to be Indonesian law the contracts would not have been signed I find it irresistible that the choice of Geneva as the "place" was also a choice that it was the formal "seat" in the legal sense By the same token it is plain that the choice of an independent neutral seat of arbitration carried with it an intention to be bound by the *lex arbitri* of that place

(3) The UNCITRAL rules require that an award is made at the place (or seat) of the arbitration Accordingly, the preliminary award the award itself and the post-award decision were all expressly stated to be made in Geneva All these were done as a matter of course It was never argued that it should be otherwise

(4) Pertamina, as evidence of "strong pointers" to rebut the presumption rely, *inter alia*, on the fact that the contracts themselves are replete with references to the provisions of Indonesian law" The expression "replete with" somewhat overstates the position but they point out that the contracts expressly provide for the modification of, in particular, four Articles of the Indonesian Code of Civil Procedure Article 650 2 (appointment of arbitrators) and 620 1 (time limit on arbitrations) have been modified, Article 631 (authority to arbitrators to decide on "amiables compositeurs") has been invoked and Article 641 (rights of appeal) has been waived.

In my judgment the existence of these provisions barely dents the fundamental principle in favour of Swiss law Both parties to this application have produced lengthy and earned academic expert opinions on the issue, and both counsel have argued the strengths and weaknesses of the competing opinions I propose to be extremely sparing in my citation of the various opinions because of the overwhelming weight to be attached to the underlying factual truth that the parties' choice of a neutral seat together with the absence of an express choice of different *lex arbitri* are the dominant factors in the equation which, in this case, results in the answer that commercial common sense demands that Indonesian law was not to be the *lex arbitri* I merely select one passage from the opinion of Mr. Robert Hornick, an American lawyer and academic of great experience in this field It

is a passage with which I agree and which I consider to be admissible as it does not purport to construe the parties intentions

> "Strictly speaking I do not think it was necessary for the parties to mention the referenced provisions because in my ___, those provisions do not apply to arbitrations where the place of arbitration is outside Indonesia and the applicable rules of arbitration are international rules (such as the UNCITRAL Rules) However it is my experience that in practice, parties often mention these provisions anyway, because there is no Indonesian law or case expressly stating that the said provisions do not apply to foreign arbitrations, and foreign parties are often concerned that Indonesian courts may seize upon one or more of such provisions to block enforcement of a foreign arbitral award in Indonesia if such arbitration has been conducted in a manner contrary to one of these provisions Enforcement of foreign arbitral awards in Indonesia has always been problematic courts may and do refuse to enforce on public policy grounds that are broadly construed The concern has been that if provisions such as these are not mentioned, the enforcing court may deem them applicable as a matter of public policy

Indeed, in my approximately thirty years of representing foreign clients in connection with contracts with Indonesian parties containing international arbitration clauses I have repeatedly been advised by local counsel that my clients should waive provisions of Indonesian arbitration law that indicate a different result from that intended by the parties notwithstanding that the place of arbitration specified was outside Indonesia and that the parties did not intend for Indonesian law to apply to the arbitration proceeding The reason given was always that it would facilitate enforcement because Indonesian courts would likely (albeit incorrectly) apply Indonesian law anyway and therefore it was best to waive provisions that could otherwise be invoked to thwart enforcement

This approach to Indonesian contract drafting is not limited to arbitration clauses Over the years, I have seen many dozens of Indonesian contracts where notwithstanding an express choice of foreign substantive law the contract also contained waivers of Indonesian Civil Code provisions

I definitely do not regard mention of these provisions as indicating or creating any presumption that the *lex arbitri* should be Indonesian arbitral law

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(5) Pertamina's attempt to rebut the normal principle encounters further difficulties when faced with the fact that the law of Switzerland mandatorily applies its own law as the *lex arbitri* for arbitrations within its jurisdiction "*Redfern and Hunter*" specifically refers to Chapter 12 of the Swiss Private International Law Act, Article 176(1)

> Amongst modern laws on arbitration those of Switzerland and of England are perhaps particularly clear on the link between the seat of the arbitration and the *lex arbitri* Swiss law states
>
> > The provisions of this chapter shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland

(6) I agree with the opinion of KBC's experts on Swiss Law, Professor Kaufman-Konier and Ellest Geisinger, who in their joint opinion stated, quite simply

> 'It is of the greatest importance to understand that, by choosing Switzerland as the seat of the arbitration, parties from abroad trigger the application of the provisions of chapter 12 PIL

— by operation of law — as the *lex arbitri* This is trite law in Switzerland It should also be stressed that Swiss law requires no connecting factor with Switzerland in addition to the seat of the arbitration Moreover several authorities correctly point out that the circumstance that the seat of the arbitrator is in Switzerland not only triggers the application of chapter 12 PIL as the law of the arbitration, but also means that the award is deemed to have been rendered in Switzerland within the meaning of the New York Convention of 1958 A Swiss judge would therefore have no hesitation as considering Switzerland as the country of origin of the award within the meaning of Article V(e) of the New York Convention This is entirely consistent with the overall trend favouring the seat of the arbitration as the factor identifying the law of the arbitration

> Therefore, the seat of the arbitration (or place of arbitration in the legal sense) was without doubt located in Switzerland Consequently, the law of the arbitration or *lex arbitri* was Swiss law more specifically chapter 12 PIL"

This is a statement of foreign law and, as such, is a factor that this court may take into account when carrying out its task of construing the

> arbitration clauses, in particular as to what was the *lex arbitri* The relevance of such statements was put succinctly by Ma J in *Shandong Textiles Import and Export Co v Da Hua Non-ferrous Metals Co* [2002] 2 HKC at p 131
>
> In my judgment, I am not bound to follow Professor Liu's views on the application of PRC law to the two contracts The true effect and application of foreign law to the facts of any case especially when the construction or analysis of contracts is concerned is a matter ultimately for the court itself to resolve see *Dicey & Morris The Conflict of Laws* (13th Ed) Vol 1 at para 9 019"

19 For all the above reasons Pertamina's attempt to come with section 44(2)(f) must fail

2 SECTION 44(2)(d) (e) and (3)

20 Grounds 2, 3 and 4 come within these subsections to section 44 Two separate points are made

(a) Wrongful consolidation

21 Pertamina point out that the two contracts, the JOC and the ESC are separate contracts containing separate arbitration clauses The parties to the contract are different Under the JOC they were KBC and Pertamina and under the ESC they are PLN on the one hand and Pertamina

and KBC on the other On 30 April 1998 KBC served a single notice of arbitration on Pertamina, PLN and the Government of Indonesia arising out of disputes under both contracts Pertamina and PLN objected to a single arbitration In support of their objection they submitted that the UNCITRAL rules did not provide for such consolidation, the contracts had different parties and different timetables for performance and contains no provisions for consolidated arbitrations In fact, there was no consolidation in the sense that two arbitrations were heard together The Tribunal merely ruled that one notice of arbitration was sufficient for disputes arising from both contracts

22 The Tribunal permitted a single arbitration and in doing so, stated as follows

> As the position and responsibility of each party under the ESC are different, disputes were likely to arise not only between KBC and PERTAMINA on the one hand and PLN on the other hand but also between two of the parties or between KBC and PLN against PERTAMINA or between KBC on the one hand and PERTAMINA and PLN on the other This last configuration was the more probable as both PERTAMINA and PLN are owned by the (Government of Indonesia) and thus have common interests
>
> > The question to solve is only whether KBC could validly act against PERTAMINA and PLN in a single arbitration pursuant to the two arbitration clauses included in the two contracts

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> The Arbitral Tribunal accepts KBCs position according to which a party may act against several parties bound by different but similar arbitration clauses As explained by Swiss Federal Tribunal in its decision of July 19 1988 in the famous Westland Case (Rev Arb 1989, p 514), the validity of such a single action depends on the connexity of the claims and of appropriateness ("*opportunite*") However as stressed by the Swiss Federal Court in this decision, the positions of the parties in the disputes remain independent as to the substance of the claims
>
> Consequently KBCs action in a single arbitration would be admissible in case of connexity of the legal relations between KBC and PERTAMINA on the basis of the JOC on the other hand and between KBC PERTAMINA and PLN on the basis of the ESC on the other hand However, the use of the word connexity to describe the relationship between the JOC and the ESC would be an understatement In reality the two contracts are integrated"

23 Fundamental to Pertamina's argument is the submission that the contracts are sequential The JOC provides for the production of energy, the ESC provides for the sale of energy if it is ever produced Thus, it is said, the ESC must follow the JOC and to this extent they are fundamentally different contracts and not "integrated" On

closer analysis however this difference is comfortably outweighed by their connexity

24 The JOC contains the following provisions

> Effective Date means the date this Contract is approved by the Minister of Mines and Energy of the Republic of Indonesia
>
> *Article 21* This Contract shall become effective on the Effective Date and the term of this Contract (the 'Term') shall be for a period ending five hundred and four (504) Months after the Effective Date unless extended or earlier terminated as provided herein'

Identical provisions appear in the ESC

25 The JOC states

> Each such Energy Sales Contract shall be an integral part of this Contract, and to the extent the provisions of the Energy Sales Contract obligate the Parties hereto shall be deemed incorporated into this Contract for all purposes
>
> *Article 63* PERTAMINA shall regularly consult with CONTRACTOR on all matters pertaining to the Energy Sales Contracts and shall promptly provide to CONTRACTOR a copy of any notice or communication received thereunder or with respect thereto PERTAMINA shall not cause or allow any termination amendment modification waiver

renegotiation or renewal of any Energy Sales Contract or any provision thereof without the prior express written consent of CONTRACTOR

26 The ESC states

> "This Contract is an Energy Sales Contract whereby PLN agrees to purchase from PERTAMINA, upon the terms and conditions contained in this Contract, all Electricity produced by and delivered from or made available by the Generating Facilities constructed by (KBC) as contractor to PERTAMINA pursuant to the Joint Operation Contract"

27 The contracts are plainly integrated as found by the Tribunal Perhaps most importantly the ESC concludes

> "The terms of this Contract and the Joint Operation Contract constitute the entire agreement between the Parties"

28 A further factor supporting the "connexity" or integrated nature of the two contracts is that throughout the arbitration both Pertamina and PLN were represented by the same lawyers They did not suggest any embarrassment or potential conflict in so doing Thus Pertamina's argument in this application that the "consolidation" compromised privacy or confidentiality, which is an essential feature of arbitration, is of little or no substance Similarly, the complaint that Pertamina was forced to arbitrate with a third party as a result of the consolidation is not made out because PLN, in the context of the contractual arrangements, could not be regarded as a third party

29 It also goes against Pertamina that once the decision was made to have a single arbitration they proceeded to the main hearing and have only revived this point in the enforcement proceedings I shall deal with this submission in a little more detail when I consider the next issue (appointment of arbitrators) KBC rely on it for both issues and seek support from the case of *Minmetals Germany v Ferco Steel* [1999] 1All ER 315

30 Having decided to have a single arbitration it is plain from the award that Pertamina and PLN were given careful and separate consideration KBC are able to highlight many references in the award which clearly demonstrate this separate consideration Given therefore the connexity of the contracts, the separate consideration by the Tribunal, the lack of prejudice to Pertamina and failure to appeal the decision at the time KBC's position as stated from the very outset in May 1999 namely

> "Where as here, the disputes involve not only a single Project consisting of two closely related parts (the JOC part and the ESC part) but also contracts with virtually identical arbitration clauses the case for allowing disputes under the one agreement to be arbitrated in the same arbitration with disputes under the other would seem to be even more compelling

is well made

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(b) The arbitrators were not properly appointed

31 The two contracts contains provision for the appointment of arbitrators as follows

(1) Art 132 of the JOC provided that each of Pertamina and KBC would appoint an arbitrator within 30 days after the date of a request to initiate arbitration The two arbitrators would then appoint a third arbitrator to act as Chairman If arbitrators were not appointed as aforesaid the same should be appointed by the Secretary General of the Internation Centre for Settlement Disputes (ICSID)

(2) Section 82 of the ESC provided that PLN, on the one hand, and KBC and Pertamina, on the other hand, would each appoint one arbitrator within 30 days after the date of a request to initiate arbitration The provisions dealing with appointment of the Chairman and default appointments were in the same terms as the JOC

32 The ESC provision is plainly intended for disputes between KBC and Pertamina on the one hand and PLN on the other, the two contracting parties being KBC and Pertamina on the one hand and PLN on the other However, in this arbitration KBC and Pertamina were on opposite sides The Tribunal's solution was entirely logical and correct It ruled that in such a situation Article 8 had no application therefore the UNICITRAL rules for the appointment of arbitrators should be applied The *lex arbitri*, Swiss Law Article 179(1) Private International Law Act provides that

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The arbitrators shall be appointed removed or replaced in accordance with the agreement of the parties

33 In this particular situation there was no agreement to which accord could be given The agreement in section 8 was for a different situation The Tribunal said

> According to the Respondents this provision would mean that in any dispute arising from the ESC KBC and PERTAMINA should appoint jointly one arbitrator and PLN should appoint one arbitrator The Arbitral Tribunal one the basis of the above mentioned principles of interpretation, cannot accept that such has been the intent of the parties Indeed as the ESC arbitration clause does not apply only to disputes opposing KBC and PERTAMINA to PLN it would defy common sense in case of a dispute between two parties only or in case of disputes opposing KBC to PERTAMINA and PLN that KBC and PERTAMINA be obliged to appoint jointly one arbitrator The parties may not be considered as having reasonably envisaged such a solution
>
> It results from this analysis that the provision of Section 8(2) of the ESC according to which KBC and PERTAMINA should appoint jointly an arbitrator applies only to disputes opposing PLN to KBC and PERTAMINA The consequence is that for disputes between two parties only or disputes opposing KBC to PLN and PERTAMINA or disputes opposing PERTAMINA to PLN and KBC the parties have not expressly agreed in the ESC arbitration clause on the

procedure relating to the appointment of the arbitrators Thus the appointment of the arbitrators must be made according to the UNCITRAL Arbitration Rules

Pursuant to Article 5 of the UNCITRAL Arbitration Rules, the number of arbitrators must be three if the parties have not previously agreed on the number of arbitrators Pursuant to Article 7 of the UNCITRAL Arbitration Rules "if three arbitrators are to be appointed each party shall appoint one arbitrator" In case of disputes opposing more than two parties it implies that two groups of parties must be constituted each group being treated as a party for the purpose of appointing arbitrators Such regrouping may be difficult and even impossible in the case of parties with different interests

There is no such difficulty in this case where the parties have considered with the constitution of the Arbitral Tribunal in a specific case of tripartite arbitration ie disputes opposing PLN to KBC and PERTAMINA They have expressly admitted that a group of two parties KBC and PERTAMINA, which have not necessarily common interests should appoint jointly an arbitrator It is thus implicit that they were admitting that in the case of disputes opposing one party to a differently constituted group of two parties the same solution should apply by analogy

On the basis of the above, the Arbitral Tribunal is satisfied that when the Secretary General of ICSID

appointed an arbitrator, failing an appointment by the Respondents he was respecting the intention of the parties This conviction is strengthened by the fact that when the Respondents were requested to nominate an arbitrator they did not decline the invitation of the rationale that they were requested to make a joint nomination Their argumentation was that the Notice of Arbitration was premature as KBC had neglected the amicable consultation provisions of the JOC and the ESC

34 It is significant also that the Tribunal pointed out, in the final paragraph above, that neither Pertamina nor PLN objected to the arbitrator who was appointed as a result of this procedure, Dr. El-Khosen, and neither did they seek to challenge the Preliminary Award on this issue They accepted Dr. El-Khosen who became one of a three member Tribunal of the highest international reputation and calibre

35 Finally, as with the "consolidation" issue, KBC submits that having failed to challenge the Tribunal's decision Pertamina are deemed to have waived any irregularity (if there was any) KBC rely, in part, on the judgment of Colman J in the *Minmetals* case (*infra*) In answer Pertamina say two things Firstly, the facts of the *Minmetals* case are very different and secondly, Pertamina did object to the method of appointing the arbitrators They did so as a preliminary argument to the Tribunal before its preliminary award, they did so in the Indonesian annulment proceedings and they are doing so now, in the enforcement proceedings

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36 Taking the second point first, KBC accepts that Pertamina has objected at those times but that is not the point The point is that once the Tribunal had made its decision (on consolidation and on the appointment of the arbitrators) Pertamina made no challenge to the decision to the supervisory court KBC has never accepted that Indonesia was the supervisory court, and this court has agreed with that stance, and so Pertamina's submission to the Jakarta court is neither here nor there The argument is, and this court agrees, that, having been ruled against on a preliminary issue, remaining silent thereafter until the enforcement stage may be construed as a waiver, if indeed there had been an irregularity

37 As to the application of the *Minmetal's* case, KBC do not put it forward as an identical or even substantially similar situation to the present case The facts are indeed different It does however lend support to the principle being advanced by KBC and it is persuasive in that context Colman J said

> In international commerce a party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound not only by the local arbitration procedure but also by the supervisory jurisdiction of the courts of the seat of the arbitration If the award is defective or the arbitration is defectively conducted the party who complains of the defect must in the first instance pursue such remedies as exist under that supervisory jurisdiction That is because by his agreement to the place in question as the seat of the arbitration he has agreed not only to refer all disputes to arbitration but

that the conduct of the arbitration should be subject to that particular supervisory jurisdiction Adherence to that part of the agreement must in my judgment be a cardinal policy consideration by an English court considering enforcement of a foreign award"

3 SECTION 44(2)(c)

38 The complaint here is that sub-section 2(c) applies because Pertamina was "unable to present its case" due to two factors (Grounds 5 and 6) Firstly, it had applied for an adjournment to the Tribunal but had been refused and secondly that it had made an application for discovery of documents which was not resolved

39 The applications for adjournment and discovery were made at the same time and arose because of KBC's rebuttal pleading which was filed on 8 May 2000, 16 weeks before the hearing was due to commence This rebuttal was filed in accordance with the timetable set down by the Tribunal Pertamina and PLN also filed its rejoinder within time, on 9 June, the application for adjournment and discovery had been made by letter on 16 May and the adjournment was refused by letter from the Tribunal dated 23 May 2000

40 Pertamina submit that the application should have been granted because KBC, in its rebuttal had raised a fundamentally new case" concerning their funding of the project and Pertamina needed both time and further discovery to properly investigate the matter

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41 The primary reason that Pertamina must fail in this attempt to invoke section 44(2)(c) and persuade this court not to enforce the award is that their description of a "fundamentally new case" is an overstatement of the position It was not so new as to cause this court to depart from the basic principle that procedural matters are essentially matters for the Tribunal These were procedural matters, upon which decisions were made, from which it cannot be shown that Pertamina did not get a fair hearing

42 Put briefly, KBC's "new" case on financing, as pleaded in the rebuttal, was that if third party financing was not available (the original intent) KBC would have relied on its investors to provide or continue financing This was not a "new" case but came as an answer to a claim in Pertamina's reply that KBC were not entitled to future loss of profit because they would not have been able to continue to finance the project in Indonesia after the contracts were terminated KBC's "loss of profit" stemmed from the Statement of Claim Pertamina could have sought discovery then It had not done so

43 Having been denied an adjournment Pertamina prepared its rejoinder which is a comprehensive 53-page pleading The funding issue was dealt with in evidence during the hearing On the final day of the hearing Pertamina's counsel was involved in the following exchanges (the Tribunal had refused an adjournment but left open the discovery request)

> MR CHAIRMAN May we before departing have a discussion on what is going to be done now in these

proceedings and we see two items on this particular agenda There were first a certain number of procedural objections which have been made before this hearing and in the procedural order we said that this would be decided after the hearing In summary there was a request for discovery from one side and there was objection to the submission of this arbitral award and the business of confidentiality You remember this discussion

MR MISHKIN (for Pertamina) I think there was request for discovery from both sides

MR CHAIRMAN Our first question is are these requests maintained all of them part of them, because we would like to know on what we have to decide

MR MISHKIN May I just give you my views on that question

MR CHAIRMAN Yes

MR MISHKIN And that is that the purpose of discovery is to prepare for the hearing, it is not to supplement the record after the hearing So I think the discovery requests are moot, and if discovery is now permitted then you have to re-open the proceedings and so on So I treated notwithstanding the fact that it was theoretically open I treated this request as effectively being denied and we went forward Our request went to the purported financial ability the purported financing that would have been made available and other things

and I think the record on that has been fully made I am prepared to rest on that record and so I think the discovery requests should no longer be in the picture

MR SCHILLER I agree

PROF BERNARDINI And you agree on their withdrawing their request What about yours?

MR SCHILLER I withdraw my request

44 The fact of the matter is therefore, that Pertamina were give the opportunity to argue for discovery and elected not to do so The fact that this opportunity was afforded to them at the end of the hearing does not make the fact go away They were not refused discovery, they decided to treat their application as having been effectively denied The issue could have been re-opened The Tribunal itself could have also invited further submissions on the issue had it thought it fair and necessary to do so None of these things happened Pertamina cannot complain now

45 Some consideration must also be given to precisely what discovery Pertamina was seeking KBC make the point now, as they did at the time and as, no doubt, the Tribunal had in mind at the time they shelved the request, that the request was in very wide and vague terms I do not propose to set out the entire schedule herein It is sufficient to say that KBC's submission that it amounts to a general wide ranging non-specific, belated request is well made.

Appendix 1

4 SECTION 44(2)(d)

46 Pertamina claim to come within sub-section 2(d) in a second sense (Ground 7) on the ground that the Tribunal failed to apply Indonesian law, being the law of the contracts, to issues which were central to the disputes between the parties and thus exceeded its jurisdiction In other words, the award contains decisions "on matters beyond the scope of the submission to arbitration"

47 I can deal with this ground shortly because it seems to me to be misconceived Sub-section (2)(d) envisages a situation where a Tribunal has trespassed outside the scope of the issues being arbitrated It has exceeded its jurisdiction by deciding non-arbitral issues Pertamina have sought to come within sub-section (2)(d) by complaining that arbitral issues have been resolved incorrectly namely by a failure to apply Indonesian law to contract issues Such a failure (if it is made out) is not a matter envisaged by sub-section (2)(d) It is not for this court to revisit how the Tribunal resolved such issues in the enforcement proceedings Pertamina's complaint that substantive law was wrongly applied (which KBC do not accept) cannot be transformed into a point of jurisdiction I do not therefore consider it necessary to embark on an investigation as to whether or not the Tribunal did in fact fail to apply the substantive law

RES JUDICATA

48 Before moving on to the final ground advanced by Pertamina, namely public policy, it is necessary to deal with

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KBC's submission on the application of the principle of *res judicata* to all grounds (2) to (7) inclusive (that is headings 2 3 and 4 above)

49 I have left it to the end of the court's consideration of grounds (2) to (7) because I have regarded it as important to set out the court's decisions on each ground separately, regardless of the question of *res judicata* My decision on *res judicata* is therefore an additional, separate and discrete matter

50 KBC's argument is that reliance on sub-sections (2)(c), (d) and (e) on the issues of consolidation, appointment of arbitrators, due process and substantive law (grounds (2) to (7)) are matters of arbitration procedure which have, in effectively identical terms, been previously argued unsuccessfully in other enforcement proceedings in another jurisdiction, namely the USA It is not argued that this court is bound by the USA decision but that, provided certain conditions apply, Pertamina are estopped from raising the issues again In order to succeed on this issue KBC must demonstrate that the present situation is a case of issue estoppel, or, more fully, issue estoppel per *rem judicatam*

51 The conditions which must be satisfied for issue estoppel to apply were set out by Lord Brandon in *The Sennar (No 2)* [1985] 1 WLR at page 499

> "The first matter is that if an estoppel exists at all, it is that kind of estoppel which is known as issue estoppel per rem judicatam The second matter is that, in order to create an estoppel of that kind three requirements

have to be satisfied The first requirement is that the judgment in the earlier action relied on as creating an estoppel must be (a) of a court of competent jurisdiction (b) final and conclusive and (c) on the merits The second requirement is that the parties (or privies) in the earlier action relied on as creating an estoppel and those in that later action in which that estoppel is raised as a bar, must be the same The third requirement is that the issue in the later action in which the estoppel is raised as a bar must be the same issue as that decided by the judgment in the earlier action"

52 In that case Lord Brandon concluded

> In the result I would hold that this is a classic case of issue estoppel created by the judgment of a foreign court of competent jurisdiction in which all three of the requirements for the existence of such an estoppel laid down in the *Carl Zeiss* case are fully satisfied

53 The arguments for coming to a similar conclusion in the present case are compelling It seems to me that the above requirements are indeed satisfied Thus, if it were necessary in this case to make such a determination, it would be in KBC's favour However, it is not necessary to go so far as to state such a conclusion because the various grounds have been individually dealt with

5 SECTION 44(3) PUBLIC POLICY

54 In *Hebet Import & Export v Polytek Engineering* [1999] 2 HKCFAR 111 Sir Anthony Mason NPJ defined "public policy" in this context as follows

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> 'It has been generally accepted that the expression contrary to the public policy of that country in Art V2(b) means contrary to the fundamental conceptions of morality and justice of the forum

55 The same case is also support for the proposition that grounds that have been raised in section 44(2) can also be included under policy considerations within section 44(3) In this case however the grounds under section 44(2) have not been made out Pertamina however have raised two additional public policy grounds

56 The first is put in the following terms "the condemnation of Pertamina to pay when all it was doing was complying with the law governing the contract" The ground stems from the fact that the contracts were terminated as a result of Decrees made by the government of Indonesia The Tribunal specifically found that it was the Decrees which prevented the parties from performing the contracts The Tribunal applied the terms of the contracts and made a finding that the consequence of a "Government Related Event" was a risk which only Pertamina and PLN and not KBC, had to bear

57 The Tribunal's decision therefore did not make Pertamina liable for compliance with Indonesian law, it did no more than apply the terms of the contract which placed the risk of the event which actually occurred on one party but not the other

58 The decision of the court in the USA has also ruled on this matter in the following terms

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"Pertamina lastly contends that the Tribunal held it liable for refusing to violate governing Indonesian law As discussed *supra* in Section IV B 2 at 30 32 this contention mischaracterizes the Final Award The Tribunal did not find Pertamina liable for refusing to break the law Rather in the Final Award consistent with the Preliminary Award the Tribunal found that Pertamina had a contractual responsibility to make KBC whole for a Government [r]elated event' The Tribunal thus found Pertaminia liable for damages based on the parties express contractual allocation of the risk of loss As the Tribunal pointed out, the risk of loss was rational based on Pertamina's close relationship with the Indonesian Government

Pertamina accordingly has not satisfied its burden to show that the Final Award offends the 'most basic notions of morality and justice

59 By the same reasoning, enforcement of the award is not contrary to public policy in Hong Kong, on this ground

60 Secondly, and finally, Pertamina contends that KBC's failure to disclose their political risk insurance cover was contrary to the fundamental conceptions of morality and justice of the forum"

61 The court has been informed, but without evidence in support, that the political risk policy has paid out up to US$75 million, in part, to KBL's investors who had invested US$40 million in the project up to its termination KBC's pleaded case had been that its investors could have continued to invest in the project should non recourse financing cease to be forthcoming as a result of the Indonesia political turmoil

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62 Without knowledge of the political risk cover the Tribunal held

> "there is no reason to cast doubts about the Claimants readiness directly and/or through its shareholders to make provision' of 'the financing necessary for the Project development

63 Pertamina's main complaint is that had the Tribunal known of the policy there may have been reason to "cast doubts" In short, they submit that the very existence of insurance is relevant and should have been disclosed With respect, it is difficult to understand why Pertamina now argue forcefully that the existence of insurance generally was relevant The complaint is not that a particular policy was not disclosed, but the fact that insurance cover generally was not disclosed

64 The fact is that Pertamina never asked any questions about insurance cover at the arbitration hearing There was evidence from a Pertamina witness statement that is was alleged that the Notice of Arbitration was served "for insurance purposes" but his allegation was never followed up The Tribunal raised the issue on one occasion, but again Pertamina did not pursue it at all Had they regarded it as relevant and been concerned about it, they would have done so It is additionally worthy of note that KBC was not a party to the particular policy in question Moreover, there was no guarantee that the insurers would pay up under the policy in any event

65 In these circumstances it is difficult for Pertamina to argue that the Tribunal would either have "cast doubts" or that it would have come to a different decision It does not offend fundamental concepts of morality and justice As events turned out, KBC had been most prudent to arrange political risk insurance Failure to disclose that arrangement, which was designed to protect their investors, cannot, in my view, be regarded as breaching an "obligation of candour" as submitted by Pertamina I can discern no intention to mislead by KBC It seems to be another example of significance being attached to an issue, after the event

DISCRETION

66 In view of the court's decision, thus far, that Pertamina have failed to establish any grounds for sections 44(2)(a) to (f) or (3) being applied, the issue as to whether the award should nonetheless be enforced in the face of a successful ground being established, does not arise

67 It is appropriate however to make some general observations in conclusion

68 Firstly, had Pertamina been successful in coming within sections 44(2)(c), (d) or (e), this court would have exercised its discretion and granted the order sought by KBC

69 Secondly, had Pertamina come within (2)(f) or (3), KBC's task in persuading the court to exercise its discretion would have been more difficult The issues under (2)(f) and (3) are more fundamental and more important in nature Normally, a court would be inclined not to exercise

the discretion in such circumstances In this case, however, the balance would have been tipped against the norm for just one reason That reason being the lateness of the emergence of Pertamina's contentions The argument that the *lex arbitri* arbitration is Indonesian law and the complaint that the political risk policy was not disclosed, can both be described as "11th hour" challenges Such lateness would, in my judgment, dilute the strength of the arguments to the extent that it would have been appropriate to exercise the discretion to, nonetheless, enforce the award

70 For all the above reasons, I refuse an order under paragraph 1 of Pertamina's summons dated 5 September 2002 I make no order in respect of paragraph 2 seeking a discharge of Master Yuen's orders dated 23 May 2002 I make a costs order *nisi* in KBC's favour for the costs of and arising from this application with a certificate for two counsel Counsel on both sides of this application and those instructing them have been of the greatest assistance both in the depth of their research and manner of their presentation of what is, undoubtedly, an important case

(MP Burrell)
Judge of the Court of First Instance,
High Court

APPENDIX J — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, DATED APRIL 16, 2003 AND ENTERED APRIL 17, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H 01-0634

IN THE MATTER OF AN ARBITRATION BETWEEN

KARAHA BODAS COMPANY, L.L.C.,

Petitioner,

v.

PERUSAHAAN PERTAMBANGAN
MINYAK DAN GAS BUMI NEGARA

Respondent.

MEMORANDUM AND ORDER

This matter is before the Court on Perusahaan Pertambangan Minyak Dan Gas Bumi Negara's ("Pertamina's") Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) ("Rule 60(b) Motion") [Doc. # 208].[1] Pertamina asks the

1. *See* Pertamina's Memorandum in Support of its Motion to Set Aside Judgment Under Fed. R Civ. P. 60(b) [Doc. # 209], and documentary exhibits and authorities [Doc. # 211] and expert reports (Cont'd)

Court to vacate its December 4, 2001 Judgment ("Final Judgment") granting summary judgment to Karaha Bodas Company, L.L.C. ("KBC") and confirming the award of an international arbitration tribunal of more than $260 million to KBC ("Arbitral Award"). Pertamina filed its current motion pursuant to Federal Rule of Civil Procedure 60(b) almost a year after filing its Notice of Appeal from the Final Judgment. The Fifth Circuit has remanded the case to this Court for the limited purpose of determining the merits of the Rule 60(b) Motion. Having considered the parties' voluminous submissions, all matters of record, and applicable legal authorities, the Court **denies in part** Pertamina'a Rule 60(b) Motion and retains the remaining issues presented by the Motion **under advisement**.

I. *BRIEF FACTUAL AND PROCEDURAL BACKGROUND*

This case arises out of contracts between Pertamina and KBC for the construction and operation of an electrical power plant in Indonesia (the "Project"). The parties executed two contracts, the Joint Operation Contract ("JOC") and Energy Sales Contract ("ESC"), both of which contained an

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[Doc. # 212] in support thereof; KBC's Memorandum in Opposition to Pertamina's Motion to Set Aside Judgment [Doc. #220]; Pertamina's Reply Memorandum in Support of its Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) [Doc. # 231], and expert reports [Doc. # 232] in support thereof; KBC's Sur-Reply to Pertamina's Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) [Doc. # 239]; and Pertamina's Rebuttal Memorandum in Support of its Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) [Doc. # 240].

arbitration clause calling for arbitration of disputes under the Arbitral Rules of the United Nations Commission on International Trade ("UNCITRAL"). After the Project was suspended by the government of Indonesia, KBC initiated arbitration proceedings, which resulted in a December 2000 Arbitral Award in favor of KBC .

Pertamina filed an action in the Swiss Supreme Court seeking to annul the Arbitral Award. Shortly thereafter, KBC filed the instant action to confirm the Arbitral Award. The Swiss court dismissed Pertamina's appeal for untimely payment of fees. This Court issued the Final Judgment in favor of KBC a few months later. Pertamina filed, on January 2, 2002, a timely Notice of Appeal from that Final Judgment. While its appeal was pending, Pertamina filed a new suit in Jakarta, Indonesia seeking to annul the Arbitral Award. KBC sought and obtained a Preliminary Injunction from this Court ordering Pertamina to refrain from prosecuting the Indonesian action. Despite the Preliminary Injunction, Pertamina's actions resulted in an August 7, 2002 ruling from the Indonesian court setting aside the Arbitral Award and enjoining KBC from enforcing the Award. In December 2002, Pertamina filed this Rule 60(b) Motion asserting, among other things, that this Court should grant it relief from the Final Judgment because the Arbitral Award on which it is based has been annulled by an Indonesian court. The Fifth Circuit issued a limited remand to this Court for a ruling on Pertamina's 60(b) Motion. Pursuant to the parties' agreed briefing schedule, this matter was fully briefed and ripe for adjudication as of March 26, 2002.

Appendix J

II. *ANALYSIS*

Pertamina's 60(b) Motion has three parts: (1) a request for relief from this Court's December 4, 2001 Final Judgment under Rule 60(b)(2) based on newly discovered evidence, namely the existence of political risk insurance coverage for the investment in the Project pursuant to which KBC's investors were paid $75 million; (2) a request for relief from the December 4, 2001 Final Judgment under Rule 60(b)(5) because the Central Jakarta District Court annulled the underlying Arbitral Award on August 27, 2002; and, alternatively, (3) a request that the December 4, 2001 Final Judgment be deemed satisfied to the extent of the $75 million dollar insurance payment. This Memorandum and Order addresses only the second part of Pertamina's Rule 60(b) Motion relating to the effect of the Indonesian annulment.

Rule 60(b)(5) of the Federal Rules of Civil Procedure authorizes the Court to grant relief from its Judgment if the "judgment upon which it is based has been reversed or otherwise vacated." The Central Jakarta District Court annulled the Arbitral Award on August 27, 2002. Pertamina argues that the Jakarta annulment is valid under the Convention on the Recognition and Enforcement of Foreign Tribunal Awards ("New York Convention") because Indonesia is the court with primary jurisdiction over the Arbitral Award. Thus, Pertamina argues, this Court must vacate its Final Judgment enforcing the Arbitral Award pursuant Article V(1)(e) of the New York Convention.

Appendix J

The New York Convention contemplates two types of court proceedings following an arbitral award: (i) proceedings to annul or set aside the arbitral award; and (ii) proceedings seeking recognition and enforcement of the arbitral award. *See Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997). Pursuant to Article V(1)(e) of the Convention, a court "may" refuse recognition and enforcement of an arbitration award if it has been set aside by a court of competent authority in "the country in which, or under the law of which" the award was made. The country in which, or under the law of which, the award was made is the court of "primary jurisdiction." Proceedings for recognition and enforcement of an arbitration award may be brought in the courts of any signatory country to the Convention. Such courts are said to have "secondary jurisdiction." Pertamina has submitted the Expert Report of Albert Jan van den Berg (March 29, 2002) (Ex. 7 to Pertamina's Opposition to KBC's Application for Turnover Order and Cross Motion for Stay of Enforcement and Ex. O to Pertamina's Rule 60(b) Motion), the Opinion of Professor W. Michael Reisman (May 6, 2002) (Ex. 1 to Brief in Support of Pertamina's Motion for Partial Stay and Ex. L to Pertamina's Rule 60(b) Motion), and W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 114 (1992) (Ex. 36 to Pertamina's Rule 60(b) Motion) is support of the New York Convention's jurisdictional scheme.

This Court is a court of secondary jurisdiction. That status constrained the Court on summary judgment to consider only the seven defenses to enforcement of the Arbitral Award specifically set forth in Article VI of the

Convention, whereas a court of primary jurisdiction is not so limited. *See Yusuf*, 126 F.3d at 21 (a motion to set aside an international arbitral award is controlled by the domestic law of the rendering state).

The general enforcement scheme of the New York Convention is not a matter of dispute. The issue presented by Pertamina's Rule 60(b) motion is whether, under that scheme, Indonesia has primary jurisdiction over the Arbitral Award. In its April 26, 2002 Preliminary Injunction, this Court concluded that the arbitration was conducted under the arbitral law of Switzerland, and thus Swiss courts have primary jurisdiction over the award. The Court stands by that decision, as explained hereafter. Because the Swiss Supreme Court rejected Pertamina's appeal, albeit on procedural grounds, Pertamina does not have a cognizable defense to the enforcement of the Arbitral Award under Article V(1)(e) of the New York Convention.

Pertamina now insists, contrary to its earlier actions and assertions, that the parties' contracts — the JOC and ESC — designate Indonesian arbitral law to govern the arbitration. Pertamina relies on the following contractual provisions for its position:

> The parties expressly agree to waive the applicability of (a) Article 650.2 of the Indonesian Code of Civil Procedure so that the appointment of the arbitrators shall not terminate as of the sixth (6th) Month after the date(s) of their appointments and (b) the second sentence of Article 620.1 of the Indonesian Code of Civil Procedure so that

> the arbitration need not be completed within the specific time.

JOC, Ex. 1, Article 13.2(a); ESC, Ex. 2, § 8.2(a).

> In accordance with Section 631 of the Indonesian Code of Civil Procedure, the Parties agree that the Tribunal need not be bound by strict rules of law where they consider the application thereof to particular masters to be inconsistent with the spirit of this Contract and the underlying intent of the Parties, and as to such matters their conclusion shall reflect their judgment of the correct interpretation of all relevant terms hereof and the correct and just enforcement of this Contract in accordance with such terms.

JOC, Ex. 1, Article 13.2(b); ESC, Ex. 2, § 8.2(b).

> The parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that in accordance with Section 641 of the Indonesian Code of Civil Procedure neither Party shall appeal to arty court . . . and accordingly the Parties hereby waive the applicability of Articles 15 and 108 of the Law No. 1 of 1950 and any other provision of Indonesian law and regulations that would otherwise give the right to appeal the decisions of the arbitral panel.

JOC, Ex. 1, Article 13.2(d); ESC, Ex. 2, § 8.2(d).

Pertamina's Indonesian law expert testifies that these provisions reference then applicable Indonesian law. "Declaration of Prof. Dr. Sudargo Gautama"[2] (March 25, 2002) (Ex. 5 to Pertamina's Turnover Opposition and Ex. F to Pertamina's Rule 60(b) Motion). This assertion is not disputed. Moreover, it is uncontested that Indonesian law is the substantive law governing the contracts.[3] Pertamina diverges from this Court's prior ruling by arguing that the above-quoted clauses indicate the intent of the parties to adopt Indonesian law as the procedural law governing the arbitration as well. Pertamina asserts that this Court has "eschewed" an analysis of the contracts and urges the Court to adopt Pertamina's positions. Contrary to Pertamina's contentions, the Court previously has scrutinized — and again now parses — the JOC and ESC terms. The Court finds Pertamina's position on the meaning of these contracts entirely unpersuasive.

It is the general rule that the procedural law of the place of arbitration governs an arbitration. As Pertamina's expert

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2. Gautama and his firm are counsel to Pertamina in the Indonesian action against KBC.

3. To the extent Pertamina submits Gautama's Declaration as expert opinion that Indonesian law does not permit waiver of the right to seek an annulment of an arbitration proceeding, the opinion is unsupported by authority and fails the requirements for admissibility of expert opinion established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). *See Tanner v. Westbrook*, 174 F.3d 542, 548 (5th Cir. 1999). Among other things, the testimony must be reliable and relevant. *Pipitone v. Biomatrix*, 288 F.3d 239, 243-45 (5th Cir. 2002); *Rodriguez v. Riddell Sports, Inc.*, 242 F.3d 567, 580-81 (5th Cir. 2001); *Tanner*, 174 F.3d at 546. Gautama provides no legal or other basis for his bold assertion.

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Albert Jan van den Berg has written, "the arbitration law of the country where the arbitration takes place governs the arbitration. The place of arbitration in this sense is determined by the parties in their arbitration agreement." Albert Jan van den Berg, *When is an Arbitral Award Nondomestic Under the New York Convention of 1958*, 6 PACE L. REV. 25, 44-45 (1985). Thus, by choosing to arbitrate in Geneva, Switzerland, and not including an express provision stating that Indonesian law governs the arbitration, the parties expressed their intent that the arbitration would be governed by Swiss law. *See also Karaha Bodas Co. v. Pertamina*, No. 28 OF 2002, In the High Court of the Hong Kong Special Administrative Region Court of First Instance (J. Burrell, Mar. 27, 2003) [Doc. # 242], at 14 ("I find it irresistible that the choice of Geneva as the 'place' was also a choice that it was the formal 'seat' in the legal sense. By the same token it is plain that the choice of an independent neutral seat of arbitration carried with it an intention to be bound by the *lex arbitri* of that place.").

Pertamina also cites H.G. GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 20 (2002) (Ex. 40 to Pertamina's 60(b) Motion), for the proposition that a provision calling for arbitration in one country under the arbitration law of another country "often occurs in international transactions, particularly in State contracts to which one of the contracting parties is a State or related entity." However, other authorities submitted by Pertamina call such agreements, "unusual," "exceptional," or a "dead letter." *See* Declaration of Prof. Mr. Dr. Sudargo Gautama, ¶ 14 (Ex. F to Pertamina's Rule 60(b) Motion); Expert Report of Albert Jan van den Berg, ¶¶ 9, 20 (Ex. O to Pertamina's Rule 60(b) Motion); *Yusuf Ahmed Alghanim &*

Sons v. Toys "R" Us, Inc., 126 F.3d 15, 21 n.3 (2d Cir. 1997). In any event, the issue is purely academic because the contracts at issue here contain no provision calling for arbitration under the arbitration law of another country different from the country where the arbitration was held.

The Court agrees with Pertamina's contention that the parties have contractual autonomy to chose the applicable arbitral law. *See* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARD A UNIFORM INTERPRETATION 267 (1981) (Ex. 41 to Pertamina's 60(b) Motion). "The first rule is the primary rule of party autonomy according to which the parties have the liberty to subject the arbitration agreement to the law of their choice. The second rule is the subsidiary rule of territoriality according to which the arbitration agreement is, *failing a choice of law by the parties*, governed by the law of the country where the award was made." *Id.* at 291 (emphasis added). Pertamina deduces from this innocuous general statement the unwarranted conclusion that the parties here chose Switzerland as the place of arbitration, but designated Indonesian procedural and substantive law to apply.

Article 13.2(d) of the JOC and § 8.2(d) of the ESC relate to post-award procedures, namely, a waiver of right to appeal an award to any court, not the conduct of the arbitration. The other two provisions cited by Pertamina refer to Indonesian arbitration law: one clause expressly *excludes* application of a provision of Indonesian law (JOC Article 13-2(a) and ESC § 8.2(a)), and one expressly *includes* application of a provision of Indonesian law (JOC, Article 13.2(b) and ESC, Ex. 2, § 8.2(b)). These provisions demonstrate that the parties

intended to assume control over certain arbitration procedures as a matter of contract, whether or not those procedures would otherwise be applicable as a matter of law. The presence of those provisions in the contract is not evidence of the parties' choice of Indonesian arbitral law as a whole to govern the arbitration. Rather, these provisions demonstrate merely that the parties sought to avoid speculation or later argument about the effect of those provisions. Given the extensive detail of the parties' contracts, and the enormity of the Project-related finances, the parties — had they in fact desired — could have included a provision specifically incorporating Indonesian arbitral law despite the arbitration situs in Switzerland. Had they done so, they would have altered the standard territorial rule on applicable arbitral law. The parties did not do so. Pertamina's *post hoc* and forced construction of the contracts to serve its current purposes is not supported by the contractual language to which the parties are bound.

Pertamina insists, on the one hand, that the intent of the parties must be gleaned only "from the contractual language on which they agreed at the time of contracting." Pertamina's Reply, at 34. The Court agrees that this principle of contract law applies. Nevertheless, Pertamina provides the Affidavit of G.A.S. Nayoan, the Exploration and Production Director of Pertamina, who was the principal negotiator of the contracts for Pertamina (Ex. 76 to Pertamina's Rule 60(b) Motion) as evidence of the parties' intent.[4] Under basic

4. Gautama's opinion that "the parties intended to invoke the non-excluded provisions of Indonesian law as the governing law of their arbitral proceedings" (Ex. F to Pertamina's Rule 60(b) Motion, ¶ 13), as well as van den Berg's opinion that "it was the parties' clear

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contract construction principles, endorsed by Pertamina as indicated, Nayoan's Affidavit constitutes parol evidence that is inadmissible to vary the unambiguous terms of the contracts. *See, e.g., Norfolk Shipbuilding & Drydock v. Seabulk*, 274 F.3d 249, 254 (5th Cir. 2001); *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.*, 933 F.2d 314, 320 (5th Cir. 1991). Moreover, Nayoan's self-serving Affidavit is insufficient to create a genuine issue of material fact as to the meaning of the contracts in light of Pertamina's many written, post-dispute submissions and conduct evidencing a contrary intent.

Pertamina argues that its statements and actions in litigation are immaterial and that no judicial estoppel arises from them. The Court already has found that the parties' contracts, as written, demonstrate that the parties contracted for the application of Swiss arbitral law. The post-contract factual record concerning Pertamina's conduct corroborates the Court's findings made above regarding Pertamina's intent at the time of contracting with KBC. The Tribunal issued the Arbitral Award in favor of KBC in December 2000. On February 1, 2001, Pertamina filed a proceeding to nullify the Award in the Swiss Supreme Court. This act of seeking

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intention to choose Indonesian arbitration law" (Supplemental van den Berg Opinion, Ex. P to Pertamina's Rule 60(b) Motion), are inadmissible. They are not proper expert opinions; these opinions do not represent conclusions based on technical or specialized knowledge. They are, instead, parol evidence offered on factual matters. These opinions invade the Court's province to interpret the parties' contracts as a matter of law. Moreover, these witnesses have no personal knowledge of the contract negotiations, even if such matters were admissible.

nullification from the Swiss courts, not the Indonesian court, demonstrates as a factual matter that Pertamina intended Swiss arbitral law to apply and believed that the parties had agreed to Swiss arbitral law under their contracts. Pertamina reinforced its view in this regard through its repeated efforts to resuscitate the Swiss proceeding after the April 24, 2001 dismissal by the Swiss Supreme Court for failure to timely pay filing costs.

Meanwhile, on February 22, 2001, KBC filed this action seeking confirmation of the Arbitral Award. Pertamina participated fully in this case. After the Swiss court issued its final ruling in August 2001,[5] this Court issued, on December 4, 2001, its decision granting KBC's motion for summary judgment confirming the Arbitral Award and the Final Judgment in favor of KBC. Pertamina appealed the Final Judgment, but did not file a supersedeas bond to stay execution on the judgment. Belatedly, on March 14, 2002, approximately *fifteen months* entry of after issuance of the Arbitral Award, *eight months* after the Swiss court's dismissal of its appeal, and *over three months* entry of Final Judgment in this case, Pertamina filed an annulment action in Jakarta, Indonesia, challenging the Arbitral Award and seeking an injunction and penalties against KBC's enforcement of that Award.

Pertamina attempts to explain its failure to initially and timely seek relief from the Indonesian court. Pertamina states that under Indonesian law the action could not be filed until after the Arbitral Award was registered in Indonesia, which

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5. On August 7, 2001, the Swiss Supreme Court declined to reconsider its decision end the dismissal became final.

required several procedural steps and did not take place until March 8, 2002. However, Pertamina never asserts when it began the steps to register the Award in Indonesia. Pertamina does not, in its many detailed and extensive submissions, provide any proof that it began this process promptly after the Award was issued in December 2000. Pertamina also fails to explain why it took such an extended period of time to register the Arbitral Award. Pertamina merely makes the unpersuasive, vague assertion that it commenced annulment proceedings in Indonesia "as early as was practicable" and that it "was able to cause the Award to be registered" as soon as it fulfilled the necessary procedural requirements.[6] This limited recitation stands in stark contrast to the fact that Pertamina promptly filed a proceeding challenging the Arbitral Award in Switzerland and argued strenuously for delays of proceedings before this Court pending the outcome of the Swiss proceeding. Pertamina never sought from this Court any delay pending an Indonesian action. This conduct is inconsistent with and belies Pertamina's current posture that KBC and Pertamina intended at the time of contracting that Indonesian courts have primary jurisdiction to annul the Arbitral Award.

Moreover, Pertamina's original interpretation of its contracts with KBC was in evidence when Pertamina repeatedly represented to the Tribunal that Swiss arbitral law applied to the arbitration. In its January 10,1999 "Memorial Regarding Preliminary Issues" submitted to the Tribunal, Pertamina stated "Reference to Swiss Law supports this conclusion. As a result, arbitration proceedings under both

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6. Pertamina's Memorandum is Support of Rule 60(b) Motion, at 10.

contracts are governed by Chapter 12 of the Swiss Private International Law Statute."[7] The Tribunal relied on Pertamina's urging of Swiss arbitral law in making the Award. *See, e.g.*, Preliminary Award in an Arbitration Procedure Under the UNCITRAL Arbitration Rules, September 30, 1999, § B(1) ("The Respondents support this conclusion by making reference to Swiss law as the JOC and the ESC provide for UNCITRAL Arbitration in Geneva between the parties which are neither Swiss nor Swiss resident. As a result, and under both contracts, the arbitration proceedings are governed by Chapter 12 of the Swiss Private International Law Statutes. Under Swiss law, [Respondent contends] the Arbitral Tribunal is lacking jurisdiction because KBC failed to comply with the contractual prerequisites to arbitration."); *id.* § C(1) ("The Respondents also state that, under the arbitration agreements and Swiss law, the arbitrators have no power to consolidate . . ."); *id.* § C(3) (citing the "famous Westland Case" of the Swiss Federal Tribunal in support of its decision that a consolidated arbitration was appropriate); *id.* § D(1) (Respondents contend "such solution is not acceptable under the applicable Swiss law").

In asking this Court to stay this action pending its appeal to the Swiss Supreme Court, Pertamina reiterated its belief that the parties had agreed to Swiss arbitral law. Pertamina

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7. Ex 23 to KBC's Motion for Summary Judgment, at 27. *See also id.* at 28 ("Indeed, the Swiss Courts have required that parties strictly adhere to the precise terms of their arbitration agreement"); *id.* at 33 ("The arbitrators do not, under the arbitration agreements and the Swiss law in force at the seat of arbitration, have the power . . ."); *id.* at 38 ("It would be subject to setting aside in Switzerland under Articles 179 and 190 of the Swiss PIL").

stated: "The arbitration award . . . was conducted subject to the arbitration laws of Switzerland, and the Swiss court is empowered to vacate an award rendered in Switzerland . . . KBC is asking this Court to act prematurely to confirm an award that might be overturned in the country whose law governed the arbitration."[8] These representations are strong circumstantial evidence that Pertamina intended,

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8. Respondent Pertamina's Motion for Stay Pending Resolution of Swiss Appeal and Memorandum in Support [Doc. # 13], at 1. *See also id.* at 6 ("it is fundamental that the courts of the originating nation are in the best position to pass on issues under their own law . . . Here, Pertamina's appeal encompasses questions of Swiss law"); Respondent Pertamina's Memorandum in Opposition to KBC's Motion for Summary Judgment [Doc. # 29], at 34-35 ("By adopting an arbitral procedure that resulted in such a disparate outcome, the tribunal thus exceeded its authority and failed to accord the parties equal treatment in direct contravention of the procedural law governing this arbitration. *See* RLA 1, Swiss Private International Law Statute ("PIL"), Article 182(3) ('the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in an adversarial procedure'); UNCITRAL Arbitration Rules, LA-6, Article 15 (requiring that parties 'are to be treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case.'). Neither the UNCITRAL Arbitration Rules nor the Swiss Private International Law Statute provide for non-consensual consolidation of arbitration disputes."); Pertamina's Answer to Petition [Doc. # 8], at 9 ("the applicable laws and treaties governing international arbitration give courts of the arbitration situs, here Switzerland, authority to vacate such awards"); Joint Discovery/Case Management Plan [Doc. # 11], at 2 ("the arbitration KBC seam to confirm was rendered in Geneva, Switzerland, and is subject to Swiss arbitration law (and Indonesian substantive law). Pertamina has filed with the Swiss Supreme Court an appeal of the arbitration award.").

at least until March 2002, Swiss arbitral law to apply. These representations also are strong acknowledgments by Pertamina that in fact the governing arbitral law was that of Switzerland.[9]

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9. In addition, Pertamina's comments to the Court and the Tribunal support the imposition of judicial estoppel. Judicial estoppel is a matter of federal procedure governed by federal law. *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 600 (5th Cir. 1996). Application of judicial estoppel rests in the Court's discretion. *Ahrens v. Perot Sys. Corp.*, 205 F.3d 831, 833 (5th Cir. 2000). Judicial estoppel is "a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position." *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988)); *Hall v. GE Plastic Pacific PTE, Ltd.*, No. 02-20377, 2003 WL 1747764, *4 (5th Cir. April 3, 2003); *Ahrens*, 205 F.3d at 833. Most courts have identified two limitations on the application of judicial estoppel: (1) the position of the party to be estopped must be clearly inconsistent with a prior position, and (2) the court must have accepted the prior position. *Coastal Plains*, 179 F.3d at 206; *Ahrens*, 205 F.3d at 833. Judicial acceptance means only that the court has adopted the position urged by a party, *either as a preliminary matter* or part of a final disposition. *Coastal Plains*, 179 F.3d at 206 (emphasis added). This Court explained in its Preliminary Injunction that it relied on Pertamina's assertion that the Swiss court was the court with authority to annul the Arbitral Award in waiting until that court had ruled before considering KBC's summary judgment motion. Specifically, the Court set the briefing schedule in this case to allow time for the Swiss court to rule. The Tribunal also relied on Pertamina's prior position. *See supra* at 13-14. It is widely held that a position taken in an arbitration can give rise to judicial estoppel. *See Speroni S.P.A. v. Perceptron, Inc.*, No. 98-2192, 2001 WL 700824, *4 n.l (6th Cir. June 13, 2001), and cases cited therein; *cf. Universal American Barge Corp. v. J-Chem*,

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Pertamina further disputes KBC's contention that Swiss law forbids the application of another country's arbitral law to an arbitration conducted in Switzerland. *See* Opinion of George Friedli, Esq. (June 27, 2002) (Ex. 4 to Pertamina's Partial Stay Reply and Ex. E. to Pertamina's 60(b) Motion); Supplemental Opinion of Professor W. Michael Reisman (June 27, 2002) (Ex. 5 to Pertamina's Partial Stay Reply and Ex. M. to Pertamina's 60(b) Motion). The Court need not make a definitive ruling on this aspect of Swiss law because the Court rejects Pertamina's assertion that the parties' contracts designate the application of Indonesian arbitral law.[10]

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Inc., 946 F.2d 1131,1137 (5th Cir. 1991) (an arbitration decision can have collateral estoppel or *res judicata* effect between the same parties in a subsequent proceeding). Thus, judicial estoppel does apply in this case to preclude Pertamina's current argument that Indonesia, not Swiss arbitral law applies. Pertamina's conduct reinforces this conclusion.

10. Pertamina contends that a court in any state whose law is implicated by an award may make its own determination as to whether it has primary jurisdiction over an arbitral award. *See* ANDREAS BUCHER & PIERRE-YVES TSCHANZ, INTERNATIONAL ARBITRATION IN SWITZERLAND 29, 164 (1989) (Ex. 45 to Pertamina's 60(b) Motion). Pertamina's position appears contrary to the New York Convention's scheme for providing uniform rules for enforcement of international arbitration awards. Moreover, author Bucher notes that having "a double test [for determination of primary jurisdiction], *i.e.*, that of the place of arbitration and that of the law governing the arbitration, can give rise to discrepancies." for instance, "an award purporting to be made in Switzerland under German arbitration law is considered a Swiss

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Pertamina next argues that the circumstances surrounding the negotiations of the parties' contracts evidences the parties' intent to incorporate Indonesian arbitral law. Specifically, Pertamina points to the agreements in the *Himpurna* and *Patuha* cases, in which the parties provided for arbitration in Indonesia. In those cases, the parties included the same provisions as in the JOC and ESC cited above regarding waiver or incorporation of Indonesian law. Pertamina contends that these similarities mean that the parties intended to adopt Indonesian arbitral law. Pertamina's argument falls of its own weight. What the *Himpurna* and *Patuha* cases show, if anything, is that the parties knew how to make the arbitration subject to Indonesian law if they wanted to do so. Significantly, the KBC-Pertamina JOC and ESC do not contain a key provision present in the *Himpurna* and *Patuha* contracts, namely, a requirement of arbitration in Indonesia. It is the choice of Switzerland as the site of arbitration that renders Indonesian arbitral law inapplicable, not the inclusion of the above quoted provisions in the JOC and ESC. In particular, the parties' choice of Switzerland as the arbitration site combined with the absence of an

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(Cont'd)

award in Switzerland and a German award in Germany, with the result that such an award could be challenged in both countries." *Id.* The Court is unpersuaded by Pertamina's contention that Indonesia is in the "precise position" as Germany in the foregoing example; the evidence simply does not support Pertamina's assertion that the arbitration here was made under Indonesian arbitration law. In any event, whatever effect a country's own determination of its primary jurisdiction might have within its own territorial boundaries, it does not follow that a second court, such as this one, is bound by another court's patently invalid exercise of primary jurisdiction.

agreement by the parties to apply the law of a jurisdiction other than Switzerland to the arbitration makes Swiss arbitral law applicable. The choice of Indonesia as the site for the *Himpurna* and *Patuha* arbitration negates Pertamina's attempted reliance on those cases.

Article V(1)(e) of the New York Convention provides that a court should deny enforcement of an arbitral award that has been annulled or set aside "by a competent authority of the country in which, or under the law of which" the award was made. This means that a court of secondary jurisdiction, such as this one, is discouraged from enforcing an award that has been set aside by a court of primary jurisdiction. This general proposition is not controversial. However, this premise does not answer the issue presented. First, at the time of this Court's Final Judgment, no court had annulled or set aside the Arbitral Award. This fact alone distinguishes this case from most of the cases cited by Pertamina.[11] However, even if, as Pertamina contends, a post-judgment annulment is grounds to vacate the enforcement decision, the defense applies only where an arbitral award has been annulled by a court of "competent jurisdiction." Because the Central Jakarta District Court is not a court of competent jurisdiction in light of the parties' contract, the other facts presented, and the New York Convention, the Indonesian court's ruling purporting to annul the Arbitral Award has no

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11. *See Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999); *Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F. Supp. 2d 279 (S.D.N.Y. 1999); *but cf. In re Chromalloy Aeroservices*, 939 F. Supp. 907 (D.D.C. 1996) (enforcing an arbitration award despite its annulment by an Egyptian court).

legal effect on this Court's December 4, 2001 Final Judgment confirming that Award.[12]

Pertamina additionally argues that because the Preliminary Injunction is not a final order, the Indonesian ruling should be given precedence. This argument misses the mark. Pertamina conflates the issues raised by KBC's petition to enforce the Arbitral Award with the issues presented by the Preliminary Injunction, which relate to the propriety of Pertamina seeking a second forum for annulment of the Award. In using the term "Preliminary Injunction," the Court did not hold nor intend to suggest a lack of finality on the merits of the enforcement decision, as Pertamina argues. In fact, when KBC sought an order to restrain Pertamina's participation in the Indonesian action, and when the Court issued its Preliminary Injunction and the preceding Temporary Restraining Order, this Court's Final Judgment on the merits of KBC's claims already had been entered and was on appeal at Pertamina's instance. The Court, after due consideration, rejected Pertamina's primary jurisdiction arguments in its Memorandum in support of the Preliminary Injunction issued April 26, 2002.[13] The only thing "preliminary"

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12. The High Court of the Hong Kong Special Administrative Region, Court of First Instance, reached the same conclusion in its March 27, 2003 decision in the enforcement action brought by KBC in that court. *See* Doc. # 242.

13. Although the Court recognized that Pertamina contemplated using an Indonesian annulment order as the basis for a Rule 60(b) motion, the Court anticipated that the Preliminary Injunction would forestall any Indonesian annulment order until the Court decided the propriety of Pertamina's seeking that relief at the time it did.

about these injunctions was that this Court was willing, as an accommodation to Pertamina, if requested, to consider further briefing on the propriety of the injunction. Until the Rule 60(b) Motion, Pertamina did not request such further consideration. The Court now has considered all of Pertamina's primary jurisdiction arguments *de novo* in connection with the Rule 60(b) Motion. The Court rejects Pertamina's contentions, declines to vacate its Final Judgment awarding summary judgment to KBC, and will not alter its injunction.[14] As set forth in detail above, the Court again holds that the Swiss courts have primary jurisdiction over the Arbitral Award and thus the Indonesian ruling purporting to annul the Arbitral Award is not issued by a court of competent jurisdiction. The Indonesian annulment ruling therefore is invalid an of no force and effect.

In reaching this conclusion, the Court also has considered carefully principles of finality and comity. These principles do not militate in favor of the Indonesian annulment obtained through Pertamina's circumvention of the New York Convention and by forum shopping until a court ruled in its favor. Indeed, it is Pertamina that has failed to recognize the finality of this Court's prior judgment, which was entered after Pertamina's full participation in this action and after the Swiss Supreme Court rejected Pertamina's appeal under the arbitral law applicable to the parties' arbitration. Respect

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14. The Court does not base its decision on the *res judicata* effect of its Preliminary Injunction or on a finding that Pertamina's current Rule 60(b) Motion is itself a violation of the Preliminary Injunction. Therefore, it is not necessary to discuss the expert report of Geoffrey C. Hazard, Jr., Ex. T to Pertamina's Rule 60(b) Motion.

for foreign judicial systems is an important consideration in cases under the New York Convention. *See Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz*, Nos. 01-7947, 01-9153, 2002 WL 31528664, *9 (2d Cir. Nov. 15, 2002). The interests of finality and comity are best served by enforcing this Court's Final Judgment confirming the Arbitral Award.

Pertamina's further argument that KBC has waived any objection to the jurisdiction of the Indonesian court by defending itself before that court and filing an appeal of the annulment ruling is without merit The cases of *Hanes Supply Co., Inc. v. Valley Evaporation Co.*, 261 F.2d 29, 35 n.7 (5th Cir. 1958), and *Sprague & Rhodes Commodity Corp. v. Instituto Mexicano del Café*, 566 F.2d 861, 863 (2d Cir. 1977), cited by Pertamina, deal with a party's waiver of an objection to personal jurisdiction by appearing in an action, and have no application here.[15] Moreover, Pertamina is not

15. This is a unique case, substantively and procedurally. Pertamina's citation to the Restatement (Second) of Conflict of Law and Restatement (Third) of Foreign Relations regarding recognition of foreign judgments where the issue of personal jurisdiction has been fully litigated in the foreign jurisdiction also are inapposite. Indeed, § 482(2)(a) of the Restatement (Third) of Foreign Relations provides that "a court in the United States need not recognize a judgment of the court of a foreign state if: (a) the court that rendered the judgment did not have jurisdiction of the subject matter of that action." Likewise, Pertamina's reliance on cases recognizing the decision of another court's jurisdictional ruling based on full faith and credit is misplaced. The Indonesian court's, and this Court's, jurisdiction is governed by the specific provisions of the New York Convention.

entitled to the benefit of the equitable principle of waiver. The case in Indonesia was initiated by Pertamina after it had fully litigated its positions in the Courts of the United States. Pertamina exerted only superficial effort to comply with this Court's Temporary Restraining Order and Preliminary Injunction. The Court will not penalize KBC for defending itself against Pertamina's aggressive and questionable tactics.

This Court's Preliminary Injunction ruling and its ruling today are not intended to disparage the courts of Indonesia. The Court pointedly has directed its admonishments to the conduct of Pertamina, a party subject to its jurisdiction, not to criticize Indonesian courts.[16]

III. *CONCLUSION AND ORDER*

Because the Arbitral Award was made under the arbitral law of Switzerland, the Court rejects Pertamina's contention that the December 4, 2001 Final Judgment in this case must be vacated because of the August 7, 2002 annulment of the Arbitral Award by the Central District Court of Jakarta, Indonesia. It is therefore

ORDERED that Pertamina's Rule 60(b) Motion is **denied in part** to the extent it seeks relief under Rule 60(b)(5) based on the August 7, 2002 ruling of the Indonesian court. It is farther

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16. This Court does not and has not in any way credited or relied on KBC's assertions that the Indonesian courts are not an appropriate forum because they are biased or corrupt.

ORDERED that all other aspects of Pertamina's Rule 60(b) Motion are **retained under advisement** and will be the subject of a future Memorandum and Order from this court.

SIGNED this 16th day of April, 2003.

s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

APPENDIX K — REQUESTS FROM THE REPUBLIC OF INDONESIA FOR THE U.S. STATE DEPARTMENT TO INTERVENE IN THE KARAHA/PERTAMINA DISPUTE

AIDE MEMOIRE

Legal dispute between Pertamina versus KBC
and
Restrained Fund of The Government of Indonesia
At the Bank of America

The legal dispute arose as the independent power producer Karaha Bodas Co. LLC (KBC), a Cayman Islands company, enforced a judgment entered by the United States District Court for the Southern District of Texas upon the court's confirming a US$ 261 million arbitral award obtained by KBC against the Indonesian state-owned oil and gas enterprise, *Perusahaan Pertambangan Minyak dan Gas Bumi* (Pertamina).

The arbitral award of KBC arises from 2 (two) geothermal energy recovery and power generation projects in the Karaha Bodas concession area of West Java, Indonesia. Under a Joint Operation Contract between KBC and Pertamina signed in November 1994, KBC served as a contractor to explore and develop geothermal energy in the contract area, and to build, own, and operate two power plants capable of generating electricity under the terms of the contract. Under an Energy Sales Contract between KBC, Pertamina, and PLN, a state-owned Indonesian electric utility, PLN agreed to purchase and KBC on behalf of Pertamina agreed to sell to PLN, a certain amount of electricity generated from the power plants.

Appendix K

In the late summer of 1997 Indonesia and other Asian countries experienced a severe economic crisis. The crisis inevitably caused the Indonesian economy to stagnate. As part of the economic response to the crisis, and after consultation with the International Monetary Fund (IMF) and the World Bank, the Government of Indonesia undertook certain macroeconomic policies to reduce current account deficit. The policy taken included reducing the development budget by postponing a number of infrastructure projects, including Karaha Bodas. The decision to reschedule these projects was announced in Presidential Decree No. 39 of September 20, 1997. Under Presidential Decree No. 47 of November 1, 1997, the Karaha Bodas project was temporarily reinstated. However, due to the commitment to economic recovery and reform program developed with the IMF, the project was re-suspended under Presidential Decree No. 5 of January 10, 1998.

Soon thereafter KBC initiated arbitration proceedings against Pertamina, PLN, and the Government of Indonesia. The arbitration was held in Switzerland and conducted under the rules of the United Nations Commission on International Trade Law (UNCITRAL). Yet, in a preliminary award issued by the panel of the three arbitrators dated September 30, 1999, the panel dismissed the Government of Indonesia as a party to the arbitration, finding that the Government was neither a party to the underlying contracts nor that Pertamina or PLN were instrumentality or alter-ego of the Government. On December 18, 2000 the panel issued a final award which held that Pertamina and PLN were jointly and severally liable to KBC for breach of contract, and awarded KBC US$261,166,654.92 plus interest at 4 percent per year from

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January 1, 2001, for expenditures, lost profits, and the costs and expenses of the arbitration. The validity of the award has been challenged by Pertamina by filing a petition to the Central Jarkarta District Court in Jakarta, Indonesia.

In August 2001 KBC commenced an action in the US District Court for the Southern District of Texas to confirm and enforce the arbitral award against Pertamina and PLN. On December 4, 2001 the court confirmed the award which was then registered with the Southern District of Texas in January 2002. In the same month the court, on the basis of an in camera affidavit that Pertamina was not allowed to see or challenge purporting to describe the location of Pertamina assets in the United States, granted KBC's motion to register the award in federal districts outside the Southern. In February 2002 KBC registered the award in the Southern District of New York and District of Delaware. KBC then commenced the instant action to restrain and attach assets purporting to belong to Pertamina.

On February 25, 2002 KBC obtained a Writ of Execution/ Order to Show Cause from this court authorizing it to serve a Restraint Notice and discovery requests upon certain banks and financial institutions allegedly holding funds in which Pertamina purportedly has an interest. KBC served copies of the Restraining Notice, Writ of Execution/Order to Show Cause, and a discovery Subpoena upon the banks and financial institutions on February 28, 2002. KBC also obtained similar orders from the United States District Court of Delaware, and served them on certain oil and gas companies through these companies' purported Delaware agents. In so far, the Indonesian oil and gas revenues in the

Bank of America that have been frozen now amount to US$ 250 million.

In this regard, the Government of Indonesia draws the attention of the United States Government to the court proceedings currently underway in the United States District Courts for the Southern District of Texas, Houston Division. Certain actions of the Houston Division in those proceedings in the view of the Indonsesian Government, contradicted with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on June 10, 1958, a treaty to which both the Republic of Indonesia and the United States of America are parties.

The United States Government may be aware that the New York Convention establishes a scheme for the recognition and enforcement of foreign arbitral awards among the States' parties. In particular, the New York Convention leaves the exclusive power to review the validity of the award to the courts of the country whose laws governed the particular arbitration in question, here Indonesia. That power is not shared with the court of any other country, such as the Houston Court, which are authorized under the New York Convention only to deal with the recognition and enforcement of a valid award within such country. Article V of the New York Convention enumerates certain defenses that may be asserted in the enforcement of a foreign arbitral award, including the fact that an award has been set aside or annulled by the appropriate court in the country whose laws governed the arbitration (again, in this case, Indonesia).

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On March 14, 2002, Pertamina commenced proceedings in Indonesia to annul the Award by filing application for annulment with the Central Jakarta District Court in Jakarta, Indonesia (the "Jakarta Court"). Under Indonesian law and as envisaged by the New York Convention, Pertamina was authorized to seek annulment of the Award in Indonesia because the Award was governed by the arbitration law of Indonesia. Pertamina also requested an injunction against enforcement proceedings that KBC had begun in United States courts.

On March 29, 2002, however, upon KBC's *ex parte* motion, the Houston Court explicitly directed that Pertamina withdraw its application for a preliminary injunction and temporarily prohibited Pertamina from proceeding with its annulment action before the Jakarta Court, except to allow rescheduling. In so doing, the Houston Court completely overstepped its own jurisdiction, which is restricted to recognition and enforcement of a valid Award, and actively interfered with the jurisdiction of the Jakarta Court to decide whether, in fact, the award is valid. In so doing, the Houston Court also placed the United States in violation of the New York Convention.

As the actions of a court of the United States of America are attributable to the United States of America under international law, and as the actions in question here directly affect an Indonesian subject, as well as the Government of Indonesia, the Government of Indonesia hereby urges the Government of the United States of America to intercede in those court proceedings with a view to remedying the violation of the New York Convention.

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With respect to the restrained funds at the Bank of America in New York, the Government of Indonesia would like to draw the attention of the United States Government that pursuant to Indonesian law, crude oil and natural gas operations in Indonesia are conducted by Pertamina, a state-owned enterprise, in cooperation with foreign oil and gas companies and stipulated in the production sharing contracts (PSC's). These operations include exploration, recovery, processing, refinement, transport, storage, domestic sales and export sales of crude oil, natural gas, and refined petroleum products.

Foreign and state enterprise buyers of natural gas, LNG and LPG are instructed by Pertamina, in accordance with their contracts, to send their payments to a trustee at Bank of America in New York City. These payments are allocated by the trustee to trust accounts from which debt service and other expenses are paid before the funds are further allocated among the various PSC Contractors according to their production sharing percentages.

The PSC revenues are distributed in this manner through Pertamina to the Government, i.e., what is denominated as "Pertamina's" share, belong to the Republic of Indonesia and are required to be paid to the Government of Indonesia. Specifically, the trustee is instructed to pay the share that Pertamina holds for the Government to Bank Indonesia's dollar reserve account at the New York Federal Reserve Bank. These trust accounts are now restrained from making such payments to the Indonesian Government.

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Oil and gas exports revenue comprise approximately twenty percent of Indonesia's exports and are, thus, crucial to the government budget including Indonesia's economic recovery program with the IMF. Consequently, every revenue dollar generated from oil and gas export sales now has a greater value for Indonesia's current account. Also under the IMF Letter of Intent, Indonesia's central bank, Bank Indonesia, has committed to maintain a minimum of Net International Reserves (NIR) as a reserve financing balance of payment imbalances. NIR is composed, in part, of foreign exchange assets such as the dollar revenues generated by oil and gas exports that are paid by to Bank Indonesia's dollar reserve account at the new York Federal Reserve. It is extremely important therefore for the Government of Indonesia to maintain the cash flow stability in its budget.

Furthermore, the success of the IMF - Indonesia economic recovery program depends in large part upon the continued receipt by the Government of Indonesia of revenue from the export of oil and gas by Pertamina on behalf of the government. Interruption in the receipt of this revenue, which is precisely what the restraint of funds at the garnishee banks is accomplishing, threatens Indonesia's economic recovery as well as undermines the purpose and the result of the Paris Club III.

The Southern District of New York on April 5, 2002 has determined that the LNG revenues belong to the Republic of Indonesia in which 95 % of assets are owned by the Government and 5 % by Pertamina. The release of the 95 % assets is still pending as Karaha Bodas, Co., LLC filed an appeal. The Government of Indonesia, on the other hand,

still has to prove that the remaining assets were also owned by the Government, not Pertamina.

In light of the above, the Government of Indonesia would highly appreciate the assistance of the United States Government to obtain the expeditious release of funds belonging to the Republic of Indonesia since the appeal could take months or even years.

Washington, DC, April 18, 2002

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EMBASSY OF THE REPUBLIC OF INDONESIA
Washington, D.C. 20036

057/V/02/05-ND

The Embassy of the Republic of Indonesia presents its compliment to the Department of State and, referring to the Legal Dispute between Pertamina and Karaha Bodas Co., LLC and the Restrained Fund belonging to the Government of the Republic of Indonesia at the Bank of America as well as the detailed conversations thereon between the Ambassador of the Republic of Indonesia and Senior Officials of the Department of State, has the honour to draw the attention of the latter to the following points:

1. The Government of the Republic of Indonesia considers the matter not only a legal case involving Pertamina, but also a financial problem for the State.

2. The Indonesian Presidential Decree no. 39 of September 20, 1997 on the suspension of the project in question was part of the policy taken by the Government of the Republic of Indonesia in consultation with the IMF and the World Bank in response to the economic crisis of 1997.

3. The decision of the District Court of Southern Texas in Houston dated December 4, 2001 and its Injunction Order dated April 26, 2002 are, in Indonesia's view, in contravention to the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. Furthermore, the stay order of the

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District Court of Southern New York dated April 24, 2002 to delay the release of the funds belong to the Government of Indonesia is, in Indonesia's view, not in line with the Foreign Sovereign Immunities Act.

4. The Government of the Republic of Indonesia attaches utmost importance to the satisfactory solution to the matter, considering that the continued restrained of the fund will have serious impacts on the Indonesian economic recovery efforts and, in turn, adversely effect the Indonesian reform and democratization process.

In view of the above and the strong interest shown by the United States in Indonesia's economic recovery and democratization process, as well as the friendly relations and close cooperations between the two countries, the Government of the Republic of Indonesia would highly appreciate the support and assistance of the United States Government, within all available means and constitutional possibilities, in order to obtain a satisfactory solution to the matter.

The Embassy of the Republic of Indonesia avails itself of this opportunity to review to the Department of State the assurance of its highest consideration.

Washington, D.C., May 28, 2002

Appendix K

AIDE MEMOIRE

Legal dispute between Pertamina versus KBC
and
Restrained Fund of the Government of Indonesia
At the Bank of America

The attention of the Department of State is, once again, respectfully drawn to the court proceedings in the United States District Court for the Southern District of Texas, Houston Division, with respect to the dispute between Karaha Bodas Company, L.L.C. vs. Perusahaan Pertambangan Minyak dan Gas Bumi Negara ("Pertamina"). In those proceedings, the Houston Court now has issued a preliminary injunction (the "Injunction") against Pertamina which again, based on the letter and spirit of the New York Convention, violates the Convention.

The Department may be aware that on April 26, 2002, the Houston Court issued the Injunction asserting that its judgment of December 4, 2001 confirming the arbitral award has extraterritorial effect, and enjoining Pertamina from pursuing the annulment action it has initiated in Indonesia. In so doing, the Houston Court concluded that the Indonesian court lacked jurisdiction to hear Pertamina's annulment action and otherwise made unsupported pronouncements on matters of Indonesian law.

As before, through its temporary restraining order issued on March 29, 2002, the Houston Court, by issuing the Injunction, is depriving Pertamina of its right under Indonesian law and international law, and the New York Convention, to pursue

expeditiously an action in an Indonesian court that would afford Pertamina with a defense, expressly provided for by the New York Convention, against the Houston enforcement action as well as enforcement actions worldwide. In so doing, the Houston Court is seriously interfering with the exclusive jurisdiction of the Indonesian court to review a severely flawed arbitral award.

It is apparent that the Houston Court has completely failed to understand the language and the meaning of the New York Convention, and that therefore its violations of that treaty will continue. Moreover, the disregard by the Houston Court for the legitimate proceedings in the Indonesian court and the right of Indonesia's citizens under their choice of law to pursue their rights and defenses in Indonesia and in other jurisdictions constitutes a serious affront to the sovereignty of the Republic of Indonesia.

In this connection, the Central Jakarta District Court on May 7, 2002 ruled that it had jurisdiction over Pertamina's action to annul the arbitral award. In so doing, the Jakarta Court held that the arbitration was conducted subject to Indonesian arbitration law. The Jakarta Court's ruling thus confirms Pertamina's position that the Jakarta Court is the proper court to seek an annulment under the New York Convention, and that the Houston Court does not have the jurisdiction and the authority under the New York Convention to prevent Pertamina from pursuing its action in the Jakarta Court.

In view of the above, Pertamina will have no choice but to move to stay the injunction order and appeal that order.

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In this regard, the Indonesian Government would highly appreciate the assistance of the Department of State to file a statement advising the District Court of Houston to stay the effect of the injunction order regarding the suit in Jakarta.

The second issue to be raised is the Order of the Court in the Southern District of New York issued on April 24, 2002, holding that the Government of Indonesia is entitled to ninety-five percent of the Gas Revenues restrained at the Bank of American trust accounts (presently, about US$ 350 million is restrained). The Court's Order holds that:

- The Government of Indonesia has a property right in, and therefore, is entitled to all of the restrained Gas Revenues at Bank of America except for the portion defined by Indonesian Government Regulation No. 41/1982 as Pertamina's Retention Fee, and that the Trust account can not be executed upon to the extent of the Government's portion.

- Pertamina was entitled to the Retention Fee portion of the restrained Gas Revenues and this portion could be executed upon; and

- The Court's Order is stayed pending appeal, i.e., the Gas Revenues continue to be restrained until the appeal is decided.

The effect of the Court's Order is to declare that ninety-five percent of the Gas Revenues at Bank of America cannot be restrained because they belong to the Government of Indonesia, but to delay release of the funds until after the appeal.

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The New York Court's stay of its order is undoubtedly in contradiction with the Foreign Sovereign Immunities Act ("FSIA") because none of the exceptions to immunity listed in section 1605 to 1607 of the FSIA applies with respect to the Government of Indonesia, and none of the exceptions to immunity from attachment or execution listed in sections 1610 to 1611 of the FSIA applies to divest the Gas Revenues belonging to the Government of their immunity from attachment and execution.

The District Court, therefore, does not have any basis to continue asserting jurisdiction over the Government of Indonesia or its property. The continued restraint of the Government's funds disregards Indonesia's immunity and imposes a significant and onerous litigation burden upon the Government of Indonesia that undermines its sovereignty. The restraint of these trust funds is causing severe and irreparable harm to the Government of Indonesia. The Gas Revenues are the lifeblood of Indonesia's economy and economic recovery program. Moreover, the continued restraint of these funds is preventing Indonesia from making payments to its local provinces in fulfillment of its sovereign obligations, and threatens the successful implementation of decentralization program.

Accordingly, the Indonesian Government appeals to the Government of the United States of America, once again, to file a Statement of Interest with the Court of Appeals for the Second Circuit supporting Indonesia's motion to vacate the stay. (The Government of Indonesia has filed a motion with the Court of Appeal to vacate the stay on May 7, 2002).

Washington, DC, May 23, 2002

APPENDIX L — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING, DATED AND FILED JANUARY 13, 2003

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th Day of January, two thousand three.

Docket No. 02-7513(L)
02-7515(CON)
02-7547(XAP)
02-7715(CON)
02-7717(CON)
02-7723(XAP)

KARAHA BODAS COMPANY, L.L.C.,

Petitioner-Appellee-Cross-Appellant,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA ("PERTAMINA"),

Respondent-Appellant-Cross-Appellee,

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,

Non-Party-Appellant-Cross-Appellee.

Appendix L

A petition for panel rehearing, having been filed herein by appellant, Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina").

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is **DENIED**.

FOR THE COURT
ROSEANN B. MACKECHNIE

By: s/ Arthur Heller
Arthur Heller,
Administrative Attorney

(3)

Supreme Court, U.S.
FILED
MAY 1 3 2003
OFFICE OF THE CLERK

No. 02-1510

IN THE

Supreme Court of the United States

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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IN THE

Supreme Court of the United States

No. 02-1510

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

Petitioner Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") respectfully submits this reply in further support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit ("Pet."), and in response to the Brief in Opposition of Respondent Karaha Bodas Company, L.L.C., dated May 2, 2003 ("Opp.").

ARGUMENT

Indonesian law conclusively establishes that Pertamina's right to receive its so-called Retention Fee exists *only in Indonesia* and only in the future. Pertamina has no present property interest in the particular funds currently located in the New York trusts that are being attached. Pertamina's

intangible, future property interest is not "in the United States" as the Foreign Sovereign Immunities Act ("FSIA") requires, 28 U.S.C. § 1610(b), for attachment of or execution on that interest.

1. This Court has never previously addressed the attachment and execution provisions of the FSIA. This is an appropriate case to interpret and clarify those provisions, embodied in 28 U.S.C. §§ 1609-1611, and to resolve the confusing and contradictory decisions by courts of appeals and district courts applying (and not applying) those provisions. The court of appeals' decision to permit attachment in contravention of the "in the United States" limitation in Section 1610(b) is a particularly egregious example of the failure of some lower courts faithfully to implement the FSIA's limitations on attachment. Because this case involves intangible assets and obligations of great consequence for the international money-center banking functions carried out in New York and elsewhere in the United States, the case is of significant commercial importance. The decision below has restrained, improperly, hundreds of millions of dollars that are a substantial part of the hard-currency foreign-exchange account of the Government of Indonesia, and thus the case also has important foreign policy implications.

2. The court of appeals allowed restraint and execution of dollars in New York based on a future right to receive payment in Indonesian rupiah from separate accounts abroad. That is not what Section 1610(b) of the FSIA allows. Both the district court and court of appeals relied on Indonesian law to conclude that the natural gas revenues at issue are owned by the Ministry—not Pertamina. The court of appeals accepted that the share of the trust funds nominally in Pertamina's name in the New York accounts must be entirely paid over to "the Ministry's account at the Federal Reserve Bank of New York." 313 F.3d at 91, Pet. App. 32a. From there, the funds are transferred to the Ministry's foreign-

exchange account at Bank Indonesia (Indonesia's central bank). *See* Pet. 8-10; *see also* 313 F.3d at 92, Pet. App. 34a (accepting for the purposes of its Retention Fee ruling that "Pertamina may be under an obligation" under Indonesian law to transfer the entire amount of the restrained funds to the Government's account). Thus, that there are funds "quite literally, 'in' New York," Opp. 11, is not meaningful, as those funds are the Government of Indonesia's, not Pertamina's.

a. Pertamina has only a future interest in unspecified funds, and under Indonesian law that right exists only in Indonesia. No portion of the restrained trust funds in New York is "transfer[red] back to Pertamina" in the form of its Retention Fee, contrary to Respondent's claim. Opp. at 11. Rather, Pertamina is paid in Indonesia by the Ministry in rupiah out of the Ministry's account at Bank Indonesia. These rupiah are necessarily distinct from whatever property exists or existed in New York. *See* Pet. at 8-11.

Pertamina thus has no rights to the specific property under restraint to which a judgment creditor could succeed and upon which it could execute. At most, it *will be owed a debt* by the Ministry. However, that debt accrues in Indonesia under and subject to Indonesian law, is payable solely within Indonesia, and is paid in Indonesian currency. To find that this gives rise to an intangible right susceptible to attachment and execution by a federal district court in New York is to excise the "in the United States" limitation from the text of Section 1610(b) of the FSIA. Further, even if one were to conclude—erroneously—that Pertamina's future right is property in New York, such a property right could not justify restraint and execution on the funds in the trust accounts because those belong to the Government, which is immune from suit and attachment and execution.

b. The question posed, therefore, is whether Pertamina's future right to payment from the Indonesian Government in Indonesia of an obligation that arises in Indonesia under

Indonesian law is subject to attachment in the United States. The question is *not* one "of ownership of the New York deposits and their location," Opp. 12, nor does it turn on the funds being "on deposit in Pertamina's name, subject to its possession and control," Opp. 11. For example, a trustee or nominee may hold property in its name and subject to its control, but its right is not superior to the party for which it holds the property, and such property is not subject to execution by the creditors of the trustee. That is the nature of Pertamina's relationship to the New York accounts, *see* 313 F.3d at 86, Pet. App. 22a-23a, and the question presented therefore is *not* a "factual dispute." Opp. 11.[1] Pertamina's right to its Retention Fee, the procedures governing payment of that fee, and Pertamina's relationship vis-à-vis the restrained funds are pure questions of law—in this case Indonesian law—as the district court and court of appeals ruled. *See, e.g.*, 313 F.3d at 88, Pet. App. 26a. Moreover, the situs of Pertamina's intangible future property interest is also a question of law subject to the FSIA. *See Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 265 (5th Cir. 2002) ("the situs of the intangible royalty obligations" is a "legal question"); *Fidelity Partners, Inc. v. Philippine Exp. & Foreign Loan Guarantee Corp.*, 921 F. Supp. 1113, 1119

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[1] The cases Respondent cites to suggest a fact question, Opp. 11-12, are not remotely on point. *See Anglemyer v. Hamilton County Hosp.*, 58 F.3d 533, 537 (10th Cir. 1995) (under Kansas law, the existence of an implied contract giving rise to a property interest in continued employment is usually a fact question); *Green v. City of Hamilton Hous. Auth.*, 937 F.2d 1561, 1563-64 (11th Cir. 1991) (discussing whether employee established existence of a contract providing a property interest in continued employment); *Kentucky Co. v. Hayes*, 407 F.2d 1031, 1035 (6th Cir. 1969) (discussing existence or extent of a bankrupt's interest in a U.S. savings bond jointly payable to her and her spouse under applicable law and existing facts); *Pope v. City of Clearwater*, 767 F. Supp. 1147, 1150 (M.D. Fla. 1991) (determining whether a public utility customer could possess a property interest implicated (and taken) by the utility's methods for calculating security deposit and its retention of interest on the deposit).

(S.D.N.Y. 1996) (determining the situs of a sovereign-debtor's intangible debt for purposes of the "in the United States" limitation as a matter of law); *Alejandre v. Republic of Cuba*, 42 F. Supp. 2d 1317, 1340 (S.D. Fla.), *rev'd on other grounds*, 183 F.3d 1277 (11th Cir. 1999) (same).[2]

c. The decision below obfuscates the question of how the "in the United States" limitation of the FSIA applies to debts and other intangible property rights. It focused exclusively on the physical location of particular funds in which Pertamina has no present rights, and it made no effort to grapple with the legal situs of Pertamina's intangible, future debt that is the property interest actually at issue. The decision below is not alone in this regard, as other courts have similarly failed to apply or avoided applying the "in the United States" limitation to intangible property rights. *See, e.g., Connecticut Bank of Commerce*, 309 F.3d at 265; *id.* at 266 (Dennis, J., dissenting in part from denial of rehearing) (criticizing panel for "shirk[ing] its duty" to guide the district court regarding the situs question). But still other courts dealing with this issue have correctly recognized the need to fix a legal situs to intangible property rights for FSIA

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[2] To petitioner's knowledge there are not any factual issues involved in the case. Indonesian law provided the basis for both the district court's and the court of appeals' rulings regarding the ownership of the funds. *See* Fed. R. Civ. P. 44.1. Respondent has not submitted a cross-petition for certiorari, in that or any other respect. Because the case turns on questions of law in an area never previously addressed by the Court—the execution provisions of the FSIA—as well as Indonesian law, and not the particular terms of specific instruments, this case does not share the fact-bound characteristics of *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660, 674 (1990) (Rehnquist, C.J., concurring), which otherwise recognized that foreign law could constrain the disposition of funds in the U.S. and that the happenstance of the presence of a branch bank's home office in New York did not dispose of the question of whether a deposit could be collected from the home office. *See id.* at 672-74. The Court will not find a more straightforward context than this case in which to examine the situs question as to execution against intangible property under the FSIA.

purposes, and have engaged in an extensive analysis of interests, not simply of the location of the judgment-debtor's debtor. *See Fidelity Partners,* 921 F. Supp. at 1119; *Alejandre*, 42 F. Supp. 2d at 1340. As Justice Cardozo (then Chief Judge) opined long ago, the situs of intangible assets "is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them." *Severnoe Secs. Corp. v. London & Lancashire Ins. Co.,* 255 N.Y. 120, 123, 174 N.E. 299, 300 (1931). This is such a case.

An interest-based evaluation of all pertinent factors should be applied that takes account of such issues as what law governs the obligation between the judgment-debtor and its debtor, when and where the obligation will be paid, the domicile or residence of the debtor and debtor's debtor, and where the funds on account originated, as well as factors that may be unique to sovereigns, such as inter-party immunity. To the extent that courts have engaged in such an analysis, however, it has been sui generis in the absence of guidance from this Court. *Compare Fidelity Partners*, 921 F. Supp. at 1119 (finding debt obligation to be outside the United States, and therefore rejecting execution against New York branch of bank) *with Alejandre*, 42 F. Supp. 2d at 1340-41 (allowing execution on payments made through Canadian bank accounts). In all events, whatever the mode of situs analysis, the decision below is improper. The Government of Indonesia cannot be sued in New York; the locus of interest—including for governing law, payment, and domicile—is Indonesia, not New York; the right to payment arises only in the future; and the funds distributed from the New York trusts were for payments made by foreign purchasers for Indonesian gas—none originated from U.S. purchasers.

The inconsistent and unsupervised treatment by lower courts of this recurring issue of sovereign immunity law warrants review and clarification by this Court, particularly given Congress's emphasis on "the importance of developing

a uniform body of law [under the FSIA]," H.R. Rep. No. 94-1487 at 32, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6631.

3. The decision below cannot be supported by Pertamina's contractual waiver of sovereign immunity. *See* Opp. 6, 9. To so hold would conflict with the plain text of the statute and decisions of other circuits. The default rule of Section 1609 is that no execution is permitted unless a statutory exception under Section 1610 or 1611 applies (one of which is waiver). 28 U.S.C. § 1609. Then, execution is permitted only as to "property in the United States." *Id.* §§ 1610(a), (b). The Fifth Circuit and the numerous district courts that have considered this question have thus all held that the protections of Section 1610 of the FSIA—including the "in the United States" limitation—apply to attachment and execution actions even where the sovereign has waived immunity. *See Connecticut Bank*, 309 F.3d at 247 ("Even when a foreign state completely waives its immunity from execution, courts in the U.S. may execute only against property that meets these two statutory criteria," *i.e.*, the "in the United States" limitation and the commercial activity limitation); Pet. 16-18.

4. Review by this Court is supported by foreign policy concerns. This case is about a private creditor's attempt to use U.S. courts to seize precious U.S. dollar-denominated assets of a foreign state held in the U.S. Those assets are used to meet domestic and international sovereign commitments important not only to the foreign state but to the United States and to the International Monetary Fund and other international bodies. Respondent's suggestion that those concerns simply be ignored, Opp. 14, is not tenable.

Moreover, U.S. money-center banks would suffer commercial injury if the decision below were to stand. If foreign sovereign deposits were vulnerable to attachment simply because the sovereign happens to owe money to a sovereign judgment-debtor somewhere else in the world, foreign entities would logically bank elsewhere.

5. Respondent seeks to divert attention by focusing on proceedings in other courts and ad hominem attacks. *E.g.*, Opp. 3-6. Those proceedings have no bearing on the issues presented here, nor could they justify disregard of the FSIA, and still less could they justify taking property of the Indonesian Government to satisfy a judgment against a juridically distinct sovereign instrumentality. Congress perceived "*compelling reasons*" why "Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality," H.R. Rep. No. 94-1487 at 29, *reprinted in* 1976 U.S.C.C.A.N. at 6628 (emphasis added), and enjoined the judiciary to take responsibility "to determine whether property 'in the custody of' an agency or instrumentality is property 'of ' the agency or instrumentality," *id.* at 28, *reprinted in* 1976 U.S.C.C.A.N. at 6627.

More generally, the other proceedings are subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, U.S.T. 2517, T.I.A.S. No. 6997, codified at 9 U.S.C. §§ 201 *et seq.* Those matters are proceeding in an orderly fashion as provided under the Convention and relevant rules. *See generally Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2003 WL 21027134, No. 02-20042 (5th Cir. Mar. 5, 2003). *See also Karaha Bodas Co. v. Virginia Indonesia Co.*, 57 Fed. Appx. 535, 537, 2003 WL 294519 at *2, Nos. 02-2480 & 02-3029 (3d Cir. Feb. 12, 2003) (dismissing KBC's appeal of stay orders as "sophistic"); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, No. 0203 03768 (Alta. Ct. Queen's Bench Feb. 20, 2003) (available at www.albertacourts.ab.ca/jdb/1998-2003/qb/Civil/2003/2003abqb0168.pdf) (dismissing KBC's appeal from order allowing newly-discovered evidence to be used in

U.S. and other proceedings).[3] The unprecedented anti-suit injunction issued by the Southern District of Texas is on appeal. *See Karaha Bodas Co.*, 2003 WL 21027134 at *3. The temporary restraining order of which Pertamina was held in contempt has long ago been superceded. *See* Opp. App. 87a. The proceedings in Indonesia continued to judgment because the Indonesian court rejected Pertamina's request to suspend the case while Pertamina appealed the preliminary injunction in the United States. *Cf. Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964) ("'The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum.'") (quoting *Peck v. Jenness*, 7 How. 612, 625 (1849)); *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970) ("It is settled that the prohibition of [28 U.S.C.] § 2283 cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding.") (citations omitted). None of that should distract from the issue properly presented by this petition.[4]

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[3] None of these decisions were included in Respondent's voluminous and superfluous appendix.

[4] Respondent hints that the decision below is not final, Opp. 7, but it does not challenge this Court's jurisdiction nor could it. The decision below is the Second Circuit's final word on the amenability of the Retention Fee to execution in the United States, warranting review now. Finality for purposes of post-judgment attachment or execution has a different benchmark than that for an appeal before judgment. A post-judgment attachment order is final when it resolves issues concerning attachment of particular property. *See, e.g., Giove v. Stanko*, 49 F.3d 1338, 1341-42 (8th Cir. 1995); 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3916 (2d ed. 1992).

CONCLUSION

For the reasons stated in the petition, in this reply, and in the corresponding petition filed by the Ministry of Finance of the Republic of Indonesia (No. 02-1509), the petition should be granted, as should No. 02-1509, and the cases should be consolidated for briefing, argument, and disposition.

Respectfully submitted,

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